in the Supreme Court of the United States

OCTOBER TERM, 1970

No. 70-5039

MARGARITA FUENTES,

Appellant,

vs.

ROBERT L. SHEVIN, Attorney General for the State of Florida, and the FIRESTONE TIRE AND RUBBER COMPANY,

Appellees.

BRIEF OF APPELLEE, THE FIRESTONE TIRE AND RUBBER COMPANY

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QUESTIONS PRESENTED

POINT I

DOES DEBTOR IN A SECURED CREDIT TRANSACTION HAVE AN INTEREST IN CONTINUOUS POSSESSION OF THE ITEMS OF COLLATERAL WHICH RESEMBLES IN FACT THE POSSESSORY INTEREST INVOLVED IN *SNIADACH* AND *GOLDBERG*?

POINT II

IS PROCEDURAL DUE PROCESS AFFORDED TO BOTH PARTIES TO A SECURED TRANSACTION UNDER EXISTING REPLEVIN PROCEDURES, PROVIDING FOR THE RIGHT OF PLAINTIFF'S TEMPORARY POSSESSION UPON GIVING BOND, THE RIGHT OF DEFENDANT TO RE-TAKE POSSESSION PENDING TRIAL UPON GIVING EQUAL BOND, AND THE RIGHT OF TRIAL UPON THE ISSUE OF PERMANENT POSSESSION?

POINT III

DOES THE FOURTH AMENDMENT PROHIBIT A PEACEABLE SEIZURE OF COLLATERAL UNDER WRIT OF REPLEVIN, WHICH ENFORCES A CONTRACTUAL RIGHT OF POSSESSION?

INTRODUCTION

Appellant, plaintiff in the court below, will be hereinafter referred to as "appellant" or "Mrs. Fuentes". The appellees, Robert L. Shevin,[1] Attorney General of the State of Florida, and Firestone Tire and Rubber Company, will be hereinafter referred to collectively as "appellees" or separately as "Florida's Attorney General" and "Firestone". References to the appendix filed by the appellant will be prefaced by the letter "A." References to the supplemental appendix filed herewith by Firestone will be prefaced by the letters "SA." All emphasis is ours unless otherwise indicated.

STATEMENT OF THE CASE

Appellant's statement of the case being materially incomplete and couched somewhat argumentatively Firestone takes the liberty of restating the case.

Appellant, initially applied for credit with Firestone in 1964. (A. 24). She was a 49 year old divorcee, who had been employed by an apparel factory for the previous year and a half. (A. 24). The day following her credit approval, she purchased a console television set and service policy, and in the next two years purchased a toaster, refrigerator and two bicycles, all under written conditional sales contracts providing for payment on an installment basis. (A. 24). When she renewed her credit application with Firestone in 1967, she had been employed for a year as a sewing machine operator, earning between $300.00 and $400.00 per month. (A. 24).

[1]Since this action was filed below, the Honorable Earl Faircloth, Attorney General of Florida, was succeeded in office by the Honorable Robert L. Shevin.

On June 24, 1967, appellant purchased from Firestone a gas stove, together with a service policy. (A. 24, 25). The total price, including sales tax and documentary stamp tax, was $180.53, payable in seventeen equal monthly installments of $11.00. (A. 25). While Mrs. Fuentes asserted some mechanical problems with the stove, satisfactory repairs were made, according to Firestone, at no charge to appellant. (A. 25).

On November 27, 1967, Mrs. Fuentes purchased from Firestone a hi-fi set and service policy. (A. 25). With documentary stamp tax and sales tax, the total price was $424.62. (A. 25). Both the hi-fi and stove, like her previous credit purchases, were under written contract with Firestone, who retained both the "title and right of possession of the merchandise pending full payment." (A. 32, 34). The contract provided that upon appellant's "default in any payment or payments," Firestone could repossess the goods. (A. 32, 34). Appellant made a down payment of $40.00, leaving a net balance of $384.62. (A. 25). The balance then remaining on her stove (136.53), less a refund of a portion of handling charge, brought the total cash balance for the stove and stereo to $510.95. (A. 25). To this was added a new finance charge of $101.80, for a total time balance of $612.75, to be paid over twenty-four months commencing December 2, 1967, in monthly installments of $26.00 each. (A. 25).

Mrs. Fuentes made $30.00 payments on February 6, 1968, March 15, 1968, and April 9, 1968. (A. 25). On May 21, she made a $26.00 payment, and on June 5, a $6.00 payment. (A. 25) On July 3, 1968, she paid $20.00 and on July 15, she paid a payment of $208.70. (A. 25). The effect of the last payment was to prepay installments

through March, 1969. (A. 25). She failed to make the required April, 1969, installment payment, whereupon a notice of non-payment was mailed to Mrs. Fuentes. (A. 25). The May, 1969, installment payment was not made. (A. 26). Firestone sent appellant a telegram on May 12, advising her she was required to pay the past due amount that day or return the merchandise. (A. 26). She again failed to pay. (A. 26). She was telephoned about her non-payments and advised that if she could not make the past due payments, Firestone would have to repossess the stove and hi-fi. (A. 88).

None of the past due payments having been made by September 15, 1969, Firestone filed on that date a replevin action in the Small Claims Court for Dade County, Florida. (A. 26). By its Statement of Claim in that action, Firestone averred appellant's default in payment under the conditional sales contracts and demanded return of the stove and hi-fi. (A. 35). By its sworn affidavit, Firestone averred that it was lawfully entitled to possession which was detained by appellant. (A. 36). Firestone filed bond, with corporate surety, payable to the appellant in the total sum of $408.10, conditioned to diligently prosecute the action, return the stove and hi-fi to appellant if return thereof be adjudged, and pay all sums of money recovered against Firestone by appellant in the replevin action. (A. 37).

The Small Claims Court issued its writ of replevin commanding the sheriff of Dade County, Florida, to replevy the stove and hi-fi[2] in the possession of appellant.

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[2]The stove and hi-fi were specifically described in Firestone's Statement of Claim and affidavit and in the court's writ of replevin as "(1) 5C207 Gas Range and (1) 1837WA Philco Stereo."

(A. 38). The Statement of Claim and writ of replevin were delivered to the sheriff of Dade County, Florida, for service upon appellant and execution upon the stove and hi-fi. (A. 26). On the afternoon of September 15, 1969, a deputy sheriff went to appellant's home for this purpose. (A. 26). Two employees of Firestone met the deputy at this location with a truck to physicially transport the merchandise for the sheriff. (A. 27).

Upon arrival, the deputy knocked on the screen door (the main front door being open) through which he saw a woman and two boys in the living room. (A. 27). Mrs. Delgado, appellant's daughter-in-law, came to the door. (A. 27). The deputy, speaking in English, requested to see Mrs. Fuentes. Mrs. Delgado, not speaking English, apparently did not understand the deputy. (A. 27). According to him, the two boys, ages ten and twelve, who were bilingual, understood him and invited him into the Fuentes living room. (A. 27). Mrs. Fuentes then was in the living room. (A. 27). The fact of invited entry is not in dispute between the parties. There was disagreement only as to time of invitation. According to appellant, the deputy stayed on the porch at this time and the parties conversed through the screen door. (A. 27). She contends that the deputy was invited into the house, but not until later, after her son-in-law, Mr. Leon, arrived at her home. (A. 27).

The deputy identified himself, exhibited to Mrs. Fuentes, in the presence of Mrs. Delgado, the writ of replevin and Statement of Claim and explained that he was there under court order to repossess the stove and stereo for Firestone. (A. 27). Through translation by the two boys, both Mrs. Fuentes and Mrs. Delgado were able to under-

stand what the deputy said as to the purpose of his visit and the effect of the replevin writ and Statement of Claim. (A. 27). Mrs. Delgado then became somewhat upset and emotional and objected to the repossession. (A. 28). Appellant herself made no objection or protest. The deputy acquiesced in Mrs. Delgado's request for time to contact Mrs. Fuentes' son-in-law, Mr. Leon, for advice in the matter. (A. 28). Mr. Leon spoke English. (A. 28). Upon his arrival at the Fuentes home, he explained to the deputy that *his* attorney had told him that a court proceeding was necessary before the merchandise could be repossessed. (A. 28). The deputy then explained to Mr. Leon the pendency of the court proceeding and the effect of the writ. (A. 28). Mr. Leon then agreed that the deputy could repossess the stove and hi-fi; no objection or protest was raised by appellant or Mrs. Delgado. (A. 28). The stereo was pointed out to the deputy as being in the living room and he was directed to the gas stove, which was located on an open porch outside of and at the back of the house. (A. 28). The stove and hi-fi were then removed from the premises in a truck. (A. 28).

On oral motion of appellant, the Dade County Small Claims Court continued the trial of the replevin action. (A. 40). She then filed her complaint in the court below for declaratory judgment and injunctive relief, attacking the constitutionality of Florida's statutory replevin act, §§ 78.01, 78.08, 78.10, 78.11 and 78.12, *Fla.Stats.* Firestone, not initially a defendant, was made a party defendant, along with Florida's Attorney General, to plaintiff's second amended complaint. (A. 7-13)[3].

[3]The sheriff of Dade County and his deputy, who executed the subject replevin writ, originally made parties-defendant, were dismissed by order of the lower court. (A. 14).

Motions to dismiss filed by Florida's Attorney General and Firestone were denied, but Firestone's motion to strike all references to a class action in the second amended complaint was granted. (A. 44). The answers of Firestone and Florida's Attorney General essentially denied the material allegations of the second complaint. (A. 18-21, 45-48). Additionally, Firestone averred appellant's lack of standing to maintain the subject action and to attack the constitutionality of the questioned statutory provisions. (A. 47). Moreover, it averred that appellant voluntarily consented to the entry to her home and the replevying by the sheriff of the stove and hi-fi. (A. 47). Firestone also set forth the material provisions of the conditional sales contract between it and appellant, asserting appellant's default in payment for the merchandise and Firestone's right, pursuant to the contract, to repossess the subject personalty. (A. 47, 48).

The parties filed with the court below a stipulation of facts. (A. 23-43). An evidentiary hearing was held before the court for the purpose of allowing any party to adduce evidence of any material facts not covered by the stipulation or which were reflected by the stipulation to be in dispute. (A. 44, 73-102). No additional testimony was offered by appellant or the Attorney General; Firestone, however, adduced the testimony of two of its employees with respect to Mrs. Fuentes' past credit history with Firestone, the number and dates of written and oral notices to her of default in payment and the lack of any objection or protest to repossession raised by appellant to either the deputy sheriff or to employees of Firestone, who assisted the deputy in the physical removal of the chattels from the premises. (A. 79-89, 92-102).

In opposition to appellant's renewed motion for summary judgment, which was then pending before the court below, Firestone filed an affidavit of Vincent G. Morgan, Manager of Retail Credit for Firestone. (A. 50-61). After submission of briefs by all parties and *amicus curiae*, the lower court filed its opinion on August 21, 1970 holding that Florida's replevin statute "to the extent that its provisions were before the Court by virtue of an actual controversy in this case, is constitutional." (A. 62-68). The relief sought by appellant was denied and judgment ordered for appellees. (A. 68). Final judgment for appellees, from which this appeal is taken, was entered by the lower court on September 9, 1970. (A. 69, 70).

SUMMARY OF ARGUMENT

I

In both *Sniadach* and *Goldberg* this Court placed great emphasis upon the form of property involved and the drastic economic effects of depriving rightful recipients of its use even temporarily. The same facets of the secured sales transaction must be considered. At the time of repossession, a secured creditor has in fact a property interest in the collateral at least equal to the property interest of the debtor. The remedy of summary repossession diminishes the amount of loss for both creditor and debtor in a defaulted credit transaction. This factor, together with the reduced cost of summary repossession remedies, make it possible for credit to be extended to more people.

Removal of the summary remedy would inure to the detriment of high-risk credit borrowers, notably poor people. The extension or refusal of credit to all consumers, and more so to low-income consumers, depends to a large extent upon collateralization of the loan and summary availability of the collateral in the event of default.

Constitutional adjudication of the sort sought here is particularly unsuited to solving the problems of which appellant complains. The interests involved are not truly of constitutional dimensions; the alleged abuses appellant would have reformed are properly effected by legislation. The result appellant seeks could drastically affect the delicate balance of our consumer credit economy.

II

Appellant attempts to have extended to all replevin actions the procedures *Sniadach* and *Goldberg* announced

were necessary before family income could be substantially affected. Factually, this case and the vast majority of replevin cases do not result in a deprivation which is in any manner similar to that which occurred in *Sniadach* and *Goldberg*.

Prior to *Sniadach* and *Goldberg*, no decision of this Court had even implied that creditors' pre-judgment remedies violated procedural due process, because (1) property rights alone were involved, (2) opportunities to appear and defend were provided before the creditors' rights became final, and (3) the temporary loss of use of property was not determined a "taking of property" under the constitutional provisions. *Sniadach* and *Goldberg* each involved a peremptory termination of a family's "means by which to live." This Court relied upon the nature of the property affected and the results of the procedures in question. Pre-judgment creditors' remedies were distinguished.

No item of tangible personalty subject to replevin can constitute a "means by which to live" within the meaning of the term as used in *Goldberg* and implied in *Sniadach*. If *Sniadach* is applied to replevin actions, the Court must inevitably undertake to adjudicate, item by item, the procedural due process requirements as applied to every piece of personalty claimed to be necessary.

The modern statutory replevin remedy combines ancient and common law remedies for recapture of possession of personalty. It is a necessary adjunct to the existing law of secured transactions; it is the means by which the arm of the government is put into action to enforce legal property rights recognized throughout this country. Its very strong historical origin and its unquestioned,

widely accepted usage throughout the development of our economy together make a strong case for preservation of the remedy as it exists in every jurisdiction.

Neither the case made on the facts of the replevin here involved, nor the myriad of cases hypothetically argued, justify contorting the due process clause to achieve what might be proper legislative action. The rights of parties to secured transactions are properly balanced for constitutional due process purposes under the present statutory pattern.

III

Appellant is without standing to question the constitutionality of § 78.10, *Fla.Stats.* The authority granted the executing officer by that section to break open appellant's home, if, after public demand, she refused delivery of the property, was never invoked here. Both the entry and the repossession were entirely peaceable; in fact, there is no dispute that the deputy sheriff serving the replevin writ entered appellant's home on express invitation. No force was used. No forcible entry was made. Since the "breaking" authority of § 78.10, Fla.Stats., was never called upon to be utilized, there is no genuine and justiciable Fourth Amendment controversy. Moreover, the repossession being entirely peaceable, it was not an "unreasonable" seizure condemned by the Fourth Amendment.

Fourth Amendment restrictions have historically been defined in the context of criminal liability, actual or potential. Its extensions to civilly authorized inspections have still been limited by the recognition that such intrusions on privacy are for the purpose of discovering evi-

dence which could lead to criminal prosecutions. This Court has expressly held and reaffirmed that the Fourth Amendment has no application to civil proceedings for the recovery of debts or to entries upon premises made by an officer of the law to seize chattels pursuant to a writ, such as attachment, execution or replevin. Replevin procedures are principally invoked to enforce valid private contractual rights. The fact that the aid of a sovereign is provided for that purpose by statute does not render Fourth Amendment proscriptions applicable.

The restraints against unreasonable searches and seizures are drastically relaxed where one is seeking to reclaim his property which is unlawfully in the possession of another. This is the basic predicate of statutory replevin procedures. Their long usage and judicial acquiescence imports to them the validity and efficacy under attack here.

By contract, Firestone retained title and right of possession to the stove and phonograph until full payment and was given the right to repossess in the event of any default in payment. This same right is inherent in the conditional sales contract under common law principles, which also recognized the right of peaceable entry and repossession, without judicial process. The Uniform Commercial Code adopted in all of the states except one, has codified this common law right as to secured transactions. Aid of a court officer in executing judicial process to enforce this right certainly does not impose the requirement of a search warrant. Appellant is without basis for constitutional complaint to the entirely peaceable repossession of the subject merchandise, pursuant to her own agreement.

ARGUMENT

POINT I

IN A SECURED TRANSACTION, DEBTOR'S INTEREST IN CONTINUOUS POSSESSION OF THE ITEMS OF COLLATERAL DOES NOT RESEMBLE IN FACT THE POSSESSORY INTEREST INVOLVED IN *SNIADACH* AND *GOLDBERG*.

While a number of interesting and important questions of law are presented here, one aspect of it makes this case enormously important to Firestone and to every other seller in the American economy that utilizes secured sales transactions. That aspect, of course, is whether the civil remedy existing in virtually every jurisdiction allowing repossession of collateral without the necessity of prior notice and adversary court hearings will be ruled unconstitutional on one ground or another. That result is sought by appellant on the theory, *inter alia*, that due process, under the *Sniadach*[4] and *Goldberg*[5] decisions, requires a court hearing before a secured seller may re-take possession of collateral upon which money has been loaned, notwithstanding the parties' contract and the state's statutory provision for immediate resumption of possession by the secured party. In both *Sniadach* and *Goldberg*, this Court placed great emphasis upon the form of property involved, and upon the crucial economic effects of depriving rightful recipients of its use even temporarily. It is appropriate here to examine the same facets of the secured sales transaction.

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[4]*Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969).

[5]*Goldberg v. Kelly*, 397, U.S. 254 (1970).

At the end of World War II, outstanding consumer credit was just over 5½ billion dollars, while at the end of 1968 the figure had climbed to over 113 billion dollars.[6] Of the total consumer credit, installment credit has represented a large and growing percentage. The average outstanding consumer installment credit during 1970 was 98.72 billions of dollars; the volume at the end of May, 1971, stood at 100.7 billion dollars.[7] Of total consumer installment credit, about 40% is automobile paper[8]; about 25-28% is comprised of "Other Consumer Goods".[9]

The average delinquency rate in 1966 for all types of installment credit was 1.76 per cent. Direct automobile loans had the lowest delinquency rate with 1.08%; the highest delinquency rates were recorded for FHA modernization loans — 2.41% — and for home appliance loans — 2.45%[10]

Of all retail sales, approximately 70% are now credit transactions. (Affidavit of Vincent G. Morgan, A. 51). As total installment credit has grown, the terms on which it has been extended and the kind of borrowers to whom it is available have changed, too. In the 1920's more than 80% of automobile installment paper matured in 12 months or less; by 1965, 86% extended for periods of more than

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[6]SA 10.

[7]Standard & Poors Trade and Securities Statistics, July, 1971, p. 6.

[8]*Trends In Installment Credit*, Prepared in 1967 for the Installment Credit Committee by the Department of Economics & Research, The American Bankers Association, p. 13, SA 9; *Statistical Abstract of the United States*, 91st ed., 1970. Dept. of Commerce, Bureau of the Census p. 451, SA 12.

[9]*Ibid.*

[10]*Trends In Installment Credit, supra*, at 35, SA 8.

two and one-half years. Down payments have become increasingly smaller in terms of percentage of purchase price.[11]

As the terms have become less restrictive, debt holding has increased throughout the population. Credit has become available to poor people, to the extent that in 1960, 24.8% of all households with annual income under $1,000.00 owned automobiles.[12] In 1969, 44.7% of all households with annual income under $3,000.00 owned automobiles.[13] The statistics are equally impressive for ownership of television sets, refrigerators, and to a lesser extent washing machines, clothes, dryers, and so forth. (*Ibid.*) Low income families to a substantial degree utilize credit transactions to acquire their relatively expensive possessions. The families studied in *The Poor Pay More*[14] reported:

"Table 7.1 — Method of Payment for Major Durables
(In Per Cent)

Method of Payment	Furniture at move	Furniture since move	TV	Phonograph	Sewing machine	Vacuum cleaner	Washing machine
Store and peddler credit	66	53	64	59	59	61	55
Cash borrowed	3	5	4	4	3	4	8
Cash savings	31	42	32	37	38	35	37
Total per cent	100	100	100	100	100	100	100
Total cases*	(297)	(203)	(322)	(155)	(108)	(79)	(132)

*Those who did not buy appliances from a commercial source or who did not answer the question on method of payment are excluded from the table."

[11]Moore & Klein, *The Quality Of Consumer Installment Credit* (1967), p. 146.

[12]*Statistical Abstract of the United States, supra,* at 327, SA 11.

[13]4.7% owned two or more automobiles. *Ibid.*

[14]Caplovitz, *The Poor Pay More* (1963), p. 96.

It is important to note that, while the majority of these low income families utilized credit to obtain the items described, a substantial percentage managed to do without them until sufficient cash had been saved to purchase outright. Appellant's claim that temporary use of items such as these is "crucial" in the same way as wages or welfare, is appreciably weakened by the fact that a third or more of low income families don't have possession of them at all until sufficient money is saved to pay their entire purchase price. People don't "do without" wages the way they can "do without" things.

The existence and nature of creditors' remedies influences the extensions and collections of consumer credit. Traditionally, the criteria for extension of consumer credit have been called the "three 'C's" Capacity, Character, and Collateral.[15] For poor persons, who have a relatively small "capacity" to pay installment debts, it is readily seen that "collateral", and its availability in the event of default, is an especially important criterion in determining whether poor people will be extended credit or not.

Much of the flavor of appellant's argument develops from "the archetype of the creditor as rapaciously eager to repossess, to profit hugely by resale and otherwise to oppress the debtor".[16] This conception is an "archmyth", Professor Kripke says.[17] "(I)t is accepted that repossession

[15]Wenk and Moye, "Debtor-Creditor Remedies: A New Proposal", 54 *Cornell L. Rev.* 249, 254.

[16]Kripke, "Consumer Credit Regulation: A Creditor-Oriented Viewpoint," 68 *Colum. L. Rev.* 445, 448 (1968).

[17]"Even if every dollar of principal and finance charge is ultimately realized by collection, an account that requires individual collection handling yields a loss. When expectations are defeated, the creditor no doubt tries to collect, with greater or lesser zeal; but that a creditor of institutional size deliberately walks into a collection struggle at the inception of credit is to this writer unbelievable." *Ibid.*

of consumer goods will almost invariably result in loss to the retailer . . . ." (Affidavit of Vincent G. Morgan, A. 52) Resale markets are so poor that the alleged resale profits are a fantasy.[13]

> "In the event of repossession, these goods must be sold in what is at best a thin market due to the strong consumer preference for newness per se, technological improvement resulting in rapid obsolescence of the goods, normal wear and tear of the goods in the purchaser, abused goods or the suspicion that the goods may have been misused, rendering their fitness questionable, loss of new good warranties, etc. . . . after recognition that repossession is the only course available, it is imperative that repossession not be delayed in order that the salvage value of the goods can be realized and applied to the indebtedness." (Affidavit of Vincent G. Morgan, A. 53)

Mr. Morgan analyzed the four principal factors which control or limit the percentage of loss on repossessed merchandise:

> "(a) Probably the most important factor is that in the vast majority of cases of default, the debtor will voluntarily return or surrender the merchandise. The inducement for this voluntary return is the debtor's appreciation that the creditor has the legal right to recapture the goods promptly in any event, supported by his desire to avoid legal expense, and, in some cases, loss of credit rating.

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[13]Kripke, *supra*, at 68 *Colum. L. Rev.* 448.

"(b) The next most important fact is that under our present credit system the creditor has an effective means of recovering the goods and liquidating the indebtedness in some approximate relation to the rate at which the collateral depreciates. Stated in other words, in a percentage of credit sales, which is particularly high among low income 'high risk' credit purchasers, the retailer must look solely to his goods now in possession of the purchaser as security for payment on their price. . . .

"(c) The third factor . . . is that the money realized by resale . . . can be reinvested in income producing goods, thereby offsetting a portion of the remaining loss.

"(d) The fourth factor which controls the rate of loss on repossessed goods is the fact that, whether voluntarily returned or recovered by the use of summary process, the goods can be recaptured without expenditure of substantial legal fees and court costs, which, in some cases, exceed the retail cost of the goods, and are never entirely recoverable even after judgment." (A. 52-53)

Especially when low income persons seek credit, then, its extension or refusal will depend to a large extent upon collateralization of the loan and summary availability of the collateral in the event of default. In these circumstances, the creditor's interest in the chattel is more than an illusory legal fiction; it is a property interest in fact as well as in law. In secured loans which go into default,

the security is creditor's only real hope of minimizing loss. The defaulting debtor has had the use of the article during the life of the contract, and his use has invariably caused the collateral to diminish in value. Debtor's possession and use is not unconditional; to the contrary, it is in virtually all jurisdictions subject to a secured creditor's right to resume possession upon default under the contract terms.[19] The right to possession and use of collateral is thus much different from the right to possession and use of wages. Before judgment, an unsecured creditor has no "property" in debtor's wages, while debtor has earned the wages and owns them entirely until such time as execution issues on a judgment.[20] By contrast, a secured creditor has both a legal and a property right in possession of collateral upon default. The extent of the property right is graphically demonstrated by automobile repossession experience.

It has been noted above that automobile loans represent about 40% of all consumer installment credit, and that the length of installment obligations on automobiles are for the most part in excess of two and one-half years. (*Supra*, p. 15-16) On a 24-month loan, the outstanding balance of a loan is greater than the wholesale value of the car for the first 9¼ months of the loan. During that period the lender assumes the greatest risk since he is not likely to recover the outstanding balance if the car is repossessed and sold. With a 36-month loan, this period of risk exposure is extended to 22 months; on a 42-month loan the period lasts 25 months; and on a 48-month loan, for

[19]See discussion, *infra*, p. 56, on the existence of summary repossession rights in all jurisdictions except Louisiana by virtue of the Uniform Commercial Code.

[20]Even then, they may be exempt, if the wage-earner is head of a household. E.g., *Fla. Stats.* §222.11.

32 months.[21] Of all automobiles repossessed, more than half are repossessed within the first year.[22] The percentage fluctuates, being as high as 89% from 1953 to 1955.[23] During the latter period, 34.3% of all auto repossessions occurred during the first three months after sale, and an additional 26.0% during the succeeding three months. (*Ibid.*)

The point is obvious: creditors often have a property interest in their security which is greatly in excess of the debtor's. Considering the fact that automobiles are highly susceptible to destruction in the course of their ordinary use, with or without fault on the debtor's part, the necessity for summary repossession remedies is intensified. In varying degrees, the rationale applies to almost all forms of personalty. As the gross value of the article diminishes, the relative damage to creditor increases due to use of the collateral and loss of value by passage of time; accordingly, if the relief is delayed, it may become worthless.[24]

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[21]*Trends in Installment Credit, supra* at 34; SA 7.

[22]McCracken, Mao & Frickle, *Consumer Installment Credit and Public Policy* (1965), p. 129; SA 13, 14, 15.

[23]Moore & Klein, *The Quality of Consumer Installment Credit*, (1967). p. 221-222; SA 17.

[24]The contention is not made here that appellant would have absconded with the items involved, or that she would have intentionally destroyed them — just as no contention is made that Firestone caused replevin to issue to enforce collection of a fraudulent debt. To the extent that appellant argues that there are creditors who abuse creditors' remedies, it should be noted that there are debtors who destroy or steal collateral rather than have it repossessed. The procedural change appellant seeks would leave creditors without a means to protect their interests in such cases. Unlike debtors who have an action against creditors for wrongful use of process, which can in most cases be reduced to judgment and satisfied, creditors would be remedyless as a practical matter if summary repossession were precluded.

If every repossession becomes a case for courts and lawyers, the cost to creditors of collection will increase due to delay (resulting in lower value of repossessed goods) and litigation expenses.

> "A fallacious impression which should be corrected is that business can or will absorb this additional cost in its existing profit margins. Many industries (such as the tire industry which has had an historical profit level of 3½%) simply cannot absorb this cost in their present profit margins. With respect to other industries, it is axiomatic that the motive of maximizing profits is implicit in an entrepreneur economy, which is epitomized by retailing. Such industries, already caught between increased material, money and labor costs and a quiescence in retail purchasing, will not absorb this cost, but will pass it on to the consumer in the form of increased prices in consumer durables. The basic economics involved predetermines this result." (Affidavit of Vincent G. Morgan, A. 56-57)[25]

Nor is the situation likely to be different in the already overpriced low income market. Study of the Washington, D. C., low income retail market shows that despite higher mark-ups and gross profits, so-called "ghetto retailers" do not return appreciably higher net profits. Indeed, rate of return on stockholders' equity, after taxes, was below

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[25]With a credit limit in Florida and most states, the cost of credit itself does not leave the room for profit in lending that some suspect. A recent study by National Retail Merchants Association, "Economic Characteristics of Department Store Credit", page 59, found that the enterprises studied had total credit costs in excess of total service charge revenue by 3.41% of credit sales. Some cost factors are enumerated at A. 52.

most "general" market retailers.[26] Bad debt loss experience of low income retailers was found to be about 20 times that of "general" market retailers; it accounted for about one-fourth of the total difference in gross margins.[27] "If the retail lender is lending at only one rate to nearly all of his customers (as the consumer finance companies are) and he is losing money, the obvious solution is to discard his lowest stratum of risk — those who have the worst payment record, the most tenuous and uncertain employment, etc."[28]

Thus, as Mr. Morgan's affidavit states: "Anyone who has seriously thought through the economic implications of this case would appreciate that continuance of the remedy of summary repossession is advantageous to all consumers, and absolutely essential to consumers such as [appellant]." (A. 55)[29]

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[26]"The Economic Report on Installment Credit and Retail Sales Practices in the District of Columbia", reported in Hearing before the Sub-Committee on Financial Institutions of the Senate Committee on Banking and Currency — 90th Cong. 2nd Sess., April 19, 1968. SA 6. See analysis of Professor James J. White, "Consumer Credit in the Ghetto: UCCC Free Entry Provisions and the Federal Trade Commission Study, *The Business Lawyer (Special Issue* 1969), p. 147-151.

[27]"The Economic Report on Installment Credit, etc.", *supra*, Table II-5. SA 5.

[28]White, "Consumer Credit in the Ghetto: UCCC Free Entry Provisions and the Federal Trade Commission Study", *supra*, at 145.

[29]If credit from legitimate sources cannot profitably service the low income market, that effect inures to the benefit of black-market creditors, the loan sharks. The modern view is to open the high risk credit market to legitimate lenders, and not to encourage resort to the "six for five" lenders. Seidl, "Let's Compete With Loan Sharks", 48 *Harvard Business Reviaw* (May 1970), p. 69. "Six for five" describes small loan sharks repayment "schedules"; reference is to an interest rate which returns six dollars on a five dollar loan for one week or an effective annual rate of 1.040% interest per year. *Ibid. Cf.* "An Empirical Study of the Arkansas Usury Laws: 'With Friends Like That . . . '" Vol. 1968 No. 4 *U. Ill. Law Forum* 544.

The relief appellant seeks here results from a well-intentioned, but misdirected attempt to correct what she conceives to be abuses of creditor remedies. But her complaints do not really touch the substance of the replevin remedy itself. "This is not to say that there may not be individual remedies like wage assignments which should be curbed, but curbing remedies as a general approach is wrong. It confuses the areas of oppression of the consumer with universal practice."[30] A "cure" aimed at one malady, but which has impact on all cases cannot fail to cause problems. *(Ibid.)* The basic problem has not been reached. Appellant has endeavoured to make this case conform to the problems presented by *Sniadach* and *Goldberg*, *Camera* and *See.* While there are admittedly and *Goldberg*, *Camera* and *See.* While there are admittedly broad and general similarities between this case and those, there are "centrally distinguishing and compelling facts"[31] which set them apart. One is apparent from the nature of the secured credit transaction, and the respective "property" rights of parties to it. It is demonstrable that the present statutory replevin scheme properly balances the interest of debtor and creditor in such transactions; and at the same time attends to a compelling state interest in the peaceful and orderly settlement of commercial disputes.

Before dealing with this case directly in the context of constitutional precedent, it is worthwhile to briefly note some other economic implications of discarding the summary repossession remedy. To retailers carrying their own accounts, the additional expense of changed repossession procedure would result in changes in credit ex-

[30]Kripke, "Consumer Credit Regulation: A Creditor-Oriented Viewpoint," *supra*, at 478.

[31]*Epps v. Cortese*, 326 F.Supp. 127, 133 (E.D.Pa. 1971)

tension practices. However, to the retailer who for one reason or another discounts his accounts, the change in creditor-debtor balance could result in an increased discount rate, or in recourse to the retailer for bad debts and credit charges. Profits on credit sales would be diminished across the board, and eliminated in the case of some. Retailers' endorsement of three party credit card transactions, as with banks, would undoubtedly be required. Inventory financing and other secured lending practices which can quickly go awry, would be limited by loss of these summary remedies.

Credit availability is delicately and responsively interrelated with virtually every facet of our economy. The implications of disturbing the balance must be considered. Some possible ramifications are: unreasonable restriction of credit; increase in price of retail durables, contributing to inflation; increases in "loansharkism"; further disparity in ghetto gross profit margins; and credit to low and lower median income ranges would be restricted. (Affidavit of Vincent G. Morgan, A. 59) Any decline in total retail sales would have economically predictable results on unemployment and cyclic effects incident to that condition.

When made the basis for attack on a practice and remedy of long standing, the problem of Mrs. Fuentes' stove and hi-fi takes on enormous proportions. It is respectfully contended that the problem is one particularly suited for legislation. The result urged by appellant would seriously weaken an important part of the foundation of our credit economy. If the problem is not one which compels constitutional adjudication, it should be left to the state legislatures and Congress for solution. The precedent appellant relies upon by no means compels adoption of any such constitutional principle.

POINT II

PROCEDURAL DUE PROCESS IS AFFORDED TO BOTH PARTIES TO A SECURED TRANSACTION UNDER EXISTING REPLEVIN PROCEDURES, PROVIDING FOR THE RIGHT OF PLAINTIFF'S TEMPORARY POSSESSION UPON GIVING BOND, THE RIGHT OF DEFENDANT TO RE-TAKE POSSESSION PENDING TRIAL UPON GIVING EQUAL BOND, AND THE RIGHT OF TRIAL UPON THE ISSUE OF PERMANENT POSSESSION.

A. Sniadach and Goldberg, in the context of this court's procedural due process decisions, do not require prior notice and adversary hearing before pre-judgment replevy of tangible personalty.

Appellants' due process contentions are founded almost entirely upon this Court's rulings in *Sniadach*[32] and *Goldberg*[33] that due process under the United States Constitution requires notice and hearing before a family's sole source of income may be terminated or withheld. By this action, appellant attempts to have extended to all replevin actions the procedures *Sniadach* and *Goldberg* announced were necessary before family income could be substantially affected.

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[32]*Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969).

[33]*Goldberg v. Kelly*, 397 U.S. 254 (1970).

In *Sniadach*, Family Finance Corp. instituted a garnishment action against Christine Sniadach and her employer, before its claimed debt had been reduced to judgment. Pursuant to Wisconsin statute, Sniadach's employer withheld one-half of the pay due her, subject to order of court, and paid her the balance of the earned wages. This Court found the procedure invalid, requiring that notice and hearing precede pre-judgment wage garnishment.

> *"We deal here with wages — a specialized type of property presenting distinct problems in our economic system. We turn then to the nature of that property and problems of procedural due process.*
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> * * *
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> 'The idea of wage garnishment in advance of judgment, or trustee process or wage attachment, or whatever it is called *is a most inhuman doctrine. It compels the wage earner, trying to keep his family together, to be driven below the poverty level.'*
>
> * * *
>
> The result is that a prejudgment garnishment of the Wisconsin type may as a practical matter *drive a wage-earning family to the wall."* (Footnotes omitted) 395 U.S. at 340-42.

Goldberg presented the question whether "a State that terminates public assistance payment . . . without affording . . . opportunity for an evidentiary hearing prior to termination denies the recipient procedural due process. . . ." 397 U.S. at 255. This Court quoted the District Court with approval:

"'While post-termination review is relevant, *there is one overpowering fact which controls here.* By hypothesis, a welfare recipient is destitute, without funds or assets, . . . Suffice it to say that to cut off a welfare recipient in the face of . . . *"brutal need"* without a prior hearing of some sort is unconscionable, unless overwhelming considerations justify it.' 397 U.S. at 261.

* * *

". . . For qualified recipients, *welfare provides the means to obtain essential food, clothing, housing, and medical care.* Thus, the *crucial factor in this context* — a factor not present in the case of the blacklisted government contractor, the discharged government employee, the taxpayer denied a tax exemption, or virtually anyone else whose governmental entitlements are ended — is that termination of aid pending resolution of a controversy over eligibility may deprive an *eligible* [emphasis by the Court] recipient of the *very means by which to live* while he waits. Since he lacks independent resources, his situation becomes immediately desperate." (Footnotes and citations omitted) 397 U.S. at 264.

In *Sniadach* and *Goldberg*, there were involved social relationships between and among the parties which are materially different from the relationship which exists between Mrs. Fuentes and Firestone. In *Sniadach*, a creditor, whose claim was not reduced to judgment, was able by statute to intervene in the relationship existing between Christine Sniadach and her employer; by statutory process, the creditor could cause wages, which had been earned and

were due an employee, to be withheld pending rendition of judgment on creditor's claim. The wage-earner and his or her dependents were deprived of the wages in the interim.

In *Goldberg* was involved an aspect of the relationship between government and governed in a beneficient society. Much law review commentary[34] and increasingly judicial decisions have postulated procedural due process in the government-welfare recipient relationship. So it was in *Goldberg*, a case involving the termination of government benefits which constitute "the very means . . . to live . . ."

In both *Sniadach* and *Goldberg*, the crucial factor was the necessity to maintain a source of income for survival; in neither case was there involved a private contract remedy, involving specified items of personalty, which was consented to at the time of creation of the original debt. Neither decision arose out of facts even remotely analagous to the entire body of consumer credit transactions, namely that one acquires the use and enjoyment of personal property on the condition that he pays for the property and further conditioned on the right of the seller to reclaim possession of the goods when payments are not made. In *Sniadach* the property garnished was unquestionably that of Mrs. Sniadach; Family Finance claimed no title to it nor even the right to possession of it. In *Goldberg*, the property was public funds; the issue was one of "entitlement", a concept applicable in the government-governed relationship. Neither case deals with the respective rights of private parties to enforce contractual agreements about

[34]Notably, the writings of Professor Reich, often cited by this Court: Reich, Individual Rights and Social Welfare: The Emerging Legal Issues, 74 *Yale L.J.* 1245 (1965) Reich, The New Property, 73 *Yale L.J.* 733 (1964).

possession of specified items of personal property.[35] In this case, the parties contracted that the seller retain both "title and right of possession of [the] merchandise" and that "in the event of default in any payment or payments, seller . . . may take back the merchandise . . ." (A. 32, 34).

In *Sniadach* and *Goldberg*, the Court carefully distinguished cases involving attachment of wages from attachments "in general"[36] and cessation of welfare payments from "virtually anyone else whose governmental entitlements are ended".[37] The facts of the present case are quite different from the facts in *Sniadach* or *Goldberg*. Instead of loss of use of family income, appellant has temporarily lost use of a disconnected stove and a hi-fi. So it is in every replevin action that the property involved does not constitute the entire means to live, rather the procedure is limited by definition to use in retrieving specified items of personalty.

The validity of numerous kinds of pre-judgment attachments has been questioned before this Court. Uniformly, this Court has ruled that where ordinary forms of property are involved, the procedure of attachment before judgment does not violate the due process requirements of the United States Constitution. Only in *Sniadach* has a

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[35]In *National Equipment Rental v. Szukhent*, 375 U.S. 311, 315 (1964), against due process attack, the Court sustained a private contract provision by which "a private party . . . appoint[ed] an agent to receive service of process . . . , where the agent [was] not personally known to the party, and where the agent [had] not expressly undertaken to transmit notice to the party." Defendant had actual notice of suit from the agent.

[36]*Sniadach*, 395 U.S. at 340.

[37]*Goldberg*, 397 U.S. at 264.

similar procedure been found deficient, and then only on the premise that a special form of property was involved — wages, the very means of livelihood.

Ewing v. Mytinger & Casselberry, 339 U.S. 594 (1950), involved the statutory power under the Federal Food, Drug and Cosmetic Act [21 *U.S.C.* §334(a)] to administratively seize a misbranded article, "When the Administrator has probable cause to believe from facts found without hearing, . . . that the labeling of the misbranded article . . . would be in a material respect misleading to the injury or damage of the purchaser or consumer." *Id*, at 595-96. There was no claim by the Administrator that the ingredients of the preparation seized were harmful or dangerous to health. The sole claim was that the labeling was misleading, and the product thus "misbranded". *Ibid.* Mr. Justice Douglas' opinion for the majority upheld the power to seize without notice or hearing, saying (*Id*, at 599-600):

> "*It is sufficient where only property rights are concerned, that there is at some stage an opportunity for a hearing and a judicial determination.* Phillips v. Commissioner, 283 U.S. 589, 596, 597, 75 L.Ed. 1289, 1296, 1297, 51 S.Ct. 608; Bowles v. Willingham, 321 U.S. 503, 520, 88 L.Ed. 892, 906, 64 S.Ct. 641; Yakus v. United States, 321 U.S. 414, 442, 443, 88 L.Ed. 834, 859, 64 S.Ct. 660.
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> ". . . A requirement for a hearing, as a matter of constitutional right, does not arise merely because the danger of injury may be more apparent or immediate in the one case than in the other. For all we know the most damage may come from

misleading or fraudulent labels. That is a decision for Congress, not for us. The decision of Congress was that the administrative determination to make multiple seizures should be made without a hearing. *We cannot say that due process requires one at that stage.*"

Thought it was agreed the product was not harmful, the Court refused to invalidate seizure without notice and hearing even though "irreparable damage" could result. *Id.* at 599. There was no contention that an emergency existed which required summary action.

In *Coffin Bros. & Co. v. Bennett*, 277 U.S. 29 (1928), provisions of the Georgia Banking Act were challenged which allowed levy of an execution lien upon property of bank stockholders, when stockholders did not respond to the assessed value of their stock to pay depositors of a defunct bank. The execution lien constituted a lien upon stockholders' property, and that procedure was challenged as a denial of due process because no prior notice and hearing were afforded before the execution lien attached. There was no reliance by the Court on any emergency to justify seizure. Mr. Justice Holmes' opinion was that:

". . . (t)he stockholders are allowed to raise and try every possible defense by an affidavit of illegality, . . . A reasonable opportunity to be heard and to present the defense is given . . . The fact that the execution is issued in the first instance by an agent of the state but not from a court, followed as it is by personnal notice and a right to take the case into court is a familiar method in Georgia, and is open to no objection.

* * *

"As to the lien, nothing is more common than to allow parties alleging themselves to be creditors to establish in advance by attachment a lien dependent for its effect upon the result of the suit." Id, at 31

In *Phillips v. Commissioner*, 283 U.S. 589, 596-97 (1930), Mr. Justice Brandeis stated, in his opinion for the Court:

> "Where only property rights are involved, mere postponement of the judicial inquiry is not a denial of due process, if the opportunity given for ultimate judicial determination of the liability is adequate."[38]

Cases have been before the Court in which pre-judgment seizure of property was done with some urgency;[39] but it has never been held that pre-judgment levy is available only in emergency conditions. In *North America Cold Storage, supra,* the Court expressly refused to limit seizure of putrid food to emergency cases, leaving the matter to legislation. *Id,* at 320. It was contended there without success that due process required a hearing before summary destruction of the food, when the food could have been preserved without any change in its disputed condition.

Appellant has argued that due process has rigidly required no one be deprived of "property" by state action unless first given notice and opportunity to be heard (Ap-

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[38]The statement quoted with approval in *300 West 154th Street Realty Co. v. Dept. of Buildings,* 260 N.E.2d 524 (C.A.N.Y. 1970).

[39]E.g., *Fahee v. Mallonee,* 322 U.S. 245 (1947), *North America Cold Storage Co. v. Chicago,* 211 U.S. 306 (1908).

pellants' Brief p. 14); and that pre-judgment levies have constituted an exception to this principle only under rare conditions. As appellant would have it apply to the present case, this position is untenable. To the contrary, this Court has accorded to the term "due process" a flexible definition:

> " ' "[D]ue process", unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances.' *It is 'compounded of history, reason, the past course of decisions. . ..'* "[40]

Due to the "state action" element of due process, most analagous cases which have reached this Court have involved governmental levy or seizure.[41] The efficacy of pre-judgment levy was successfully challenged *only* when the statutory scheme allowed of levy and *disposal* of property without notice to the owner and an opportunity to raise defenses before the proceeding became final.[42] This Court has considered the due process validity of pre-

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[40]*Cafeteria and Restaurant Workers Union v. McElroy*, 367 U.S. 886, 895 (1961), quoting concurring opinion in *Joint Anti-Fascist Refugee Committee v. McGrath*, 341, U.S. 123, 162, 163. Likewise, *F.C.C. v. WJR, The Goodwill Station*, 337 U.S. 265 (1948). Also see *Ownbey v. Morgan*, 256 U.S. 94 (1921).

[41]*Ewing, Coffin Bros., Phillips, Fahee, North American Cold Storage, supra; Murray v. Hoboken Land & Improvement Co.*, 18 How. 272 (1856), *Security Trust v. Lexington*, 203 U.S. 323 (1906), *Coe v. Armour Fertilizer Works*, 237 U.S. 413 (1915).

[42]*Coe v. Armour Fertilizer Works, supra*, at 422-23. To the same effect, but in proceedings not involved with levy on property, "process" which did not provide for notice to the defendant was invalidated in *Armstrong v. Manzo*, 380 U.S. 545 (1965), and *Wuchter v. Pizzutti*, 276 U.S. 13 (1928).

judgment levy by private action only in *Sniadach* and *McKay v. McInnes*, 279 U.S. 820 (1929).[43] In *McKay* the procedure was approved *per curiam*. *Sniadach* did not reverse *McKay;* the doctrine embodied in *McKay* simply was held not to apply to pre-judgment wage garnishment.

The procedure available under Maine's attachment statutes, attacked on due process grounds in *McInnes v. McKay*[44] allowed pre-judgment levy upon the real and personal property of defendant, — without notice, hearing or bond — to provide security for judgment which might subsequently be entered. The remedy was not one to determine right to possession of specific chattels; it was available to attach all property of defendant in order that any judgment for plaintiff could be satisfied. It is not evident from the statute whether personalty was physically removed from defendant's possession, but language of the Maine Supreme Court indicates that it was:

> ". . . a plaintiff could take out either a summons or attachment against the defendant and . . . since if the goods were *released* on appearance the plaintiff, recovering judgment, might not find them to seize on execution that the attachment should remain until judgment was satisfied, . . . " 141 Atl. at 701:
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> " . . . Until a sale on execution, the debtor has full power to sell or dispose of the property at-

[43] *Ownbey v. Morgan, supra,* involved pre-judgment attachment, but it is clear that the decision there was based on the fact that the procedure enabled jurisdiction quasi-in-rem to be acquired over a non-resident. Jurisdiction of a non-resident is not involved here, nor is it claimed to be involved in repelvin actions generally.

[44] 141 Atl. 699 (Me. 1928).

tached *without disturbing the possession (in case of personalty)* or rights acquired by attachment." 141 Atl. at 702

The Maine Supreme Court held the pre-judgment attachment procedure valid, over objections based solely upon due process.

"The usage and practice, therefore, of instituting suit by . . . attachment . . . had become fully established . . . at the time of the adoption of the Federal Constitution.

"All acts of the Legislature are presumed to be constitutional and it is a presumption of great strength. 'That a statute or rule of law, or custom has so long existed, unquestioned, and has been so often invoked, and universally approved, and has become ingrained like this in the jurisprudence of a state, is a strong, if not conclusive, reason for pronouncing it constitutional . . .

" . . .

"But we think it is clear that the attachment statute does not deprive the defendant of property without due process of law.

" . . .

" . . . although an attachment may, within the broad meaning of the preceding definition, deprive one of property, yet conditional and temporary as it is, and part of the legal remedy and procedure by which the property of the debtor may be taken in satisfaction of the debt, if judgment be recovered, we do not think it is the deprivation

> of property contemplated by the Constitution. And if it be, it is not a deprivation without due process of law for it is a part of a process which during its proceeding gives notice and opportunity for hearing and judgment of some judicial or other authorized tribunal. The requirements of 'due process of law' and 'law of the land' are satisfied." 141 Atl. at 702-03.

This opinion was affirmed, *per curiam*, in the Supreme Court of the United States.[45] *McKay* was cited in *Sniadach* for the proposition that procedures can be constitutionally acceptable for attachments "in general" and not necessarily be acceptable when dealing with wages — a "specialized type of property", (395 U.S. at 353).

In context, then, *Sniadach* does not hold that "due process" requires notice and hearing before every prejudgment levy, except when there is some compelling governmental interest. To the contrary, *Sniadach* specifically excluded "attachments generally" from its consideration. The replevin procedure, which is for due process purposes no different than Maine's attachment procedure, is a constitutionally acceptable procedure within the meaning of this Court's *per curiam* affirmance of *McKay*. Examination of the facts here demonstrate the wisdom of distinguishing between wages and personal property.

It cannot be gainsaid that people working for wages, in nearly all instances, need those wages to live above the poverty level. Money is the medium used to convert labor into *all* the physical necessities of life. When one is de-

[45] 279 U.S. 820 (1929).

prived of wages, by any means, the likely result is an inability to function successfully in our economic system. Very few things can happen which are fairly comparable to loss of wages — loss of employment, loss of shelter are perhaps similar. Appellant is not before this Court attempting to protect her wages, however, or her employment, or the roof over her head; she is here saying that her hi-fi and a disconnected stove are entitled to the same constitutional treatment as Mrs. Sniadach's wages.

Undaunted by the disparity between wages and a hi-fi, appellant additionally contends that "attachments generally" must be treated in the same manner as wages. Perhaps because of the facts of this case, appellant's attack is on the replevin statutes on their face.[46] (Jurisdictional Statement, p. 3). The contention is not that appellant's hi-fi or her stove were so important that the temporary loss of use of them "as a practical matter (drove) a wage-earning family to the wall." It is not contended that "attachments generally" would have that effect, or that replevy "compels the wage earner, trying to keep his family together, to be driven below the poverty level." 395 U.S. 353. The argument is that there are items of personalty, temporary loss of use of which could cause hardship. Therefore, the entire statutory scheme must allegedly fall.

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[46]The facts of this case present almost none of the problems appellant sees in the statutory procedure. The lower court's upholding of Florida's pre-judgment replevin statutes was "to the extent that its provisions were before the Court by virtue of an actual controversy in this case." 317 F.Supp. at p. 959. This Court has often said it would not undertake sweeping constitutional adjudication in such cases, e.g. *Wyman v. James*, 400 U.S. 309 (1971). Nevertheless, the broad implications of any ruling on these facts compel argument of the various points appellant raises.

Even if it be assumed that certain items of personalty are important to daily life, none has been suggested yet which is "the very means by which to live."[47] This criterion was "crucial" to the *Goldberg* decision; the same consideration was discussed extensively in *Sniadach*, where the "nature of the property" determined the requirements of procedural due process. 395 U.S. 340. Loss of use of an item or items of personalty does not present the same or similar problems.

The three-judge District Court below decided that *Sniadach* and *Goldberg* did not require notice and hearing before pre-judgment replevy in Florida;[48] the three-judge panel convened to rule on the Pennsylvania replevin procedures ruled likewise.[49]

> "Admittedly, there are broad and general procedural similarities between those cases [*Sniadach* and *Goldberg*] and the instant case; however, both have centrally distinguishing and compelling facts which make them inapposite to the case before this Court. . . . The Court emphasized the unique characteristics of wages as a '*specialized type of*

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[47]This Court's characterization of welfare payments in *Goldberg*, 397 U.S. at 264.

[48]"In sum, we think that despite *Sniadach* and *Kelly* there are still situations in which pre-judgment seizure of goods without a prior hearing is valid, see Sniadach, 395 U.S. 340, 89 S.Ct. 1820, and that replevin pursuant to a contract which authorizes a conditional seller to repossess in order to protect this security interest in the good which are the subject of the contract is one of those situations." *Fuentes v. Faircloth*, 317 F.Supp. 954, 958 (S.D.Fla. 1970).

[49]*Epps v. Cortese*, 326 F.Supp. 127 (E.D. Pa. 1971), *prob. juris. noted* 402 U.S. 994 (1971).

> *property presenting distinct problems in economic system'*. (Emphasis added) 395 U.S. at 340. To refer to wages as a 'specialized type of property' is to understate the difference between wages and *all other types of property*. To refer to wages as 'presenting distinct problems in our economic system' is to again understate the wholly unique problems incident to seizure of wages as opposed to all *other types of property*. They are the means or medium by and through which the necessities of life are purchased.
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> " . . . In contrast, the creditor here seeks specifically identifiable property to which he has reserved title and which he nows seeks in order to prevent its loss, concealment or destruction." 326 F.Supp. at 133. (Emphasis by the Court)

The Tenth Circuit Court of Appeals applied the "specialized type of property" test in a replevin action; it also refused to extend *Sniadach* to a case involving enforcement of a contractually created security interest.[50] Other courts have reached similar conclusions.[51]

A contrary result was reached by the three-judge court in New York, which held that state's replevin procedure

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[50] *Brunswick Corporation v. J & P Inc.*, 424 F.2d 100 (10th Cir. 1970).

[51] *McCormick v. First National Bank of Miami*, 322 F.Supp. 604 (S.D. Fla. 1971), repossession under U.C.C. §9-503; *Young v. Ridley*, 309 F.Supp. 1308 (D.C. 1970), mortgage sale: *Robinson v. Loyola Foundation, Inc.*, 236 So.2d 154 (Fla.App. 1st 1970), attachment; *Wheeler v. Adams Co.*, 322 F.Supp. 645 (D.Md. 1971), replevin; *Lawson v. Mantell*, 306 N.Y.S.2d 317 (Sup.Ct. 1969), replevin.

unconstitutional[52] on due process grounds, *inter alia*, by extending the *Sniadach* and *Goldberg* decisions.

> "Two problems with the *LaPrease* decision are readily apparent. First, by extending the protection of *Sniadach* to other 'specialized' types of property, the decision creates a line-drawing problem of frightening dimensions. If refrigerators, stoves, and beds are 'necessities' deserving special treatment, do chairs and carpeting merit the same? According to what rationale might such distinctions be made? Second, to the extent that the decision relies on *Goldberg v. Kelly*, such reliance appears to be misplaced. Balancing a welfare recipient's interest in maintaining an income prior to a hearing against the governmental interest in avoiding potentially unnecessary expenditures is distinguishable from the tension between the interests of a seller and a buyer. In the former situation, the government is surely the party financially better able to bear any temporary in-

[52] *LaPrease v. Raymours Furniture Co.*, 315 F.Supp. 716 (N.D.N.Y. 1970). To much the same effect is *Westinghouse Credit Corp. v. Edwards*, Common Pleas Ct. of Detroit, Mich. (Appendix F to Appellant's Reply to Motion to Dismiss or Affirm). Of the cases in which *Sniadach* has been extended, most have involved seizures which differ in some material respect from the replevin procedure: *Hall v. Garson*, 430 F.2d 450 (5th Cir. 1970), landlord's lien statute authorizing summary seizure of all household belongings; *Klim v. Jones*, 315 F.Supp. 109 (N.D. Cal. 1970), Innkeeper's lien law under which all of tenant's belongings, including the tools of his trade and all his clothes, were locked up in his room without notice; *Santiago v. McElroy*, 319 F.Supp. 284 (E.D. Pa. 1970), landlord distress statute under which tenant's entire household belongings may be taken and sold within five days, unless tenants posts bond and replevies; *Swark v. Lennox*, 314 F.Supp. 1091 (E.D. Pa. 1970), confession of judgment statute; *Mihans v. Municipal Court*, 7 Cal. 3d 497, 87 Cal.Rptr. 17 (1st App.Div. 1970), eviction writ without notice.

> equity prior to a hearing; furthermore, it has the power to shorten the period of time prior to such a hearing and thus to minimize expenditures which subsequently prove unwarranted. Less convincing is the assumption that seller must necessarily bear the risk of the possible loss, damage, or depreciation of property while he waits for his action against the buyer to be called on a congested court calendar over which he has no control." Comment, *LaPrease* and *Fuentes:* Replevin Reconsidered, 71 *Colum. L. Rev.*, 886, 896 (1971).

Though the *LaPrease* court opined that some articles of personalty are "necessities" for ordinary day-to-day living, and thus within the scope of *Sniadach*, there is no explanation why this conclusion requires prior notice and hearing before *every* replevin. If there is a provision of the United States Constitution which is violated by pre-judgment replevy of a hi-fi set, or any other chattel which is not even arguably "necessary" for human life, then it has gone unnoticed for very many years. If any such provision were either express or implied in the Constitution, it would render unnecessary the discussion in *Sniadach* and in *Goldberg* about the "crucial" nature of family income *vis-a-vis* procedural due process. If there is no provision of the United States Constitution which forbids pre-judgment replevy of non-essential personalty, then surely, a statutory replevin procedure cannot be unconstitutional on its face.[53]

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[53]"To what actions the remedy of attachment may be given is for the legislature of a State to determine and its courts to decide . . . " *Rothschild v. Knight*, 184 U.S. 334, 341.

If *Sniadach* and *Goldberg* are extended in any way to pre-judgment replevin cases, this Court will be faced with the enormous task of defining, almost by item, which cases will require notice and hearing before replevy. No standard could be devised which would successfully delineate protected items. The concept is susceptible in the end only of subjective item-by-item decision; it could be authoritatively delimited only by this Court, since it would be said to take root in the United States Constitution. The process of definition would require years, and the replevin procedure would be virtually useless in the interim. Usage of the remedy in transactions entirely between business organizations further complicates the problem. In some cases, replevin could put an enterprise out of business.[54] Would that effect make prior notice and hearing necessary? Replevy of inventories of small or poor businesses could terminate their ability to operate. Would the rights of business organizations be protected differently by the due process clause?

For constitutional adjudication, it is not enough to say that the consumer credit system has ills; or that stautory creditors' rights are sometimes abused by unscrupulous merchants. The area is one which requires legislation for solution; it is not susceptible of reform by procedural requirements which appellant seeks here.[55] Indeed, it appears that judicial alteration of the system could inure to the

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[54]*E.g., Brunswick Corporation v. J & P, Inc.*, 424 F.2d 100 (10th Cir. 1970), in which bowling alley equipment was attached.

[55]In Connecticut, legislation has been passed prohibiting creation of security interests in certain items of personalty, a very workable legislative solution to the problem of which appellant complains, but one which does not require the "overkill" of constitutional adjudication. See, *Conn. Gen. Stat. Ann.* §42a-9-209 (Supp. 1965).

detriment of consumers like appellant. Certainly it is not appropriate to contort the due process clause to achieve what might be proper legislative enactments.

> "The due process clause does not impose upon the states a duty to establish ideal systems for the administration of justice, with every modern improvement, and with provision against every possible hardship that may befall. . . . However desirable it is that the old forms of procedure be improved with the progress of time, it cannot rightly be said that the Fourteenth Amendment furnishes a universal and self-executing remedy." *Ownbey v. Morgan*, 256 U.S. 94, 110-11 (1921).

The present legislative scheme is one which does not deprive replevin defendants of a "substantial property interest"[56] within the meaning of the due process clause. Nor do the statutory enactments, which include service of a pre-judgment writ of replevin, fail to provide defendants with due process of law. The remedy as it exists in almost all jurisdictions is an integral and important part of the balanced rights of creditors and debtors in secured transactions.

The service of the summons, complaint, writ of replevin and bond (A. 35-39) constitutes notice to defendant of the pendency of the action. There is no *finality* in service of the writ; the defendant may answer and defend just as in any other action. Plaintiff, by posting bond in

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[56] *Boddie v. Connecticut*, 401 U.S. 371 28 L.Ed.2d 113, 119 (1971).

an amount double the value of the property,[57] secures the right to possession *pending* trial on the merits and subject to defendant's right to re-bond,[58] both protective provisions being absent from the Wisconsin garnishment statute struck down in *Sniadach*. The right to re-bond, and to thus maintain possession of the property during the action's pendency, gives defendant a right equal to that of the plaintiff and insures that the property or its value will be forthcoming if plaintiff prevails.[59]

Appellant argues that the re-bonding remedy is "ineffective" (Appellant's Brief, p. 22), because bonds cost money and because a forthcoming bond requires posting security in addition to premiums. (See A. 4-6). The *premium* is the same for both parties' bond ($10.00), it is just that the surety requires security for the forthcoming bond (A. 4-6). The insuror's collateral requirements are not within the control of Firestone or the State of Florida; they are the result of insuror's experience. The legislature acted reasonably when it gave both parties equal bonding rights;[60] it would certainly be acting unreasonably if it allowed defendant to regain possession of the property without the same bond plaintiff must post.

The statutory requirement for plaintiff to bond defendant's interest before replevy, together with the common-law actions for misuse of the writ, constitute ample

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[57]*Flat.Stats.* §78.07.

[58]*Fla.Stats.* §78.13.

[59]In this case the hi-fi and stove have been maintained in storage by Firestone to this day. (A. 83).

[60]See, e.g. *Dandridge v. Williams*, 397 U.S. 471, 25 L.Ed.2d 491, at 501 (1970); *Wheeler v. Adams Co.*, 322 F.Supp. 645, at 658 (D.Md. 1971); *Ownbey v. Morgan*, 256 U.S. 94, 112 (1921).

and appropriate deterrent to wrongful replevy. Appellant's argument that "economic balance" between the parties should be preserved through constitutional adjudication should not be persuasive.

The facts of this case do not include any claim by appellant that Firestone attempted to use the replevin remedy to enforce payment of a fraudulent debt, or that Firestone ever uses the writ for that purpose. There is no evidence in the record, and no study cited to the Court finding, that the remedy is used by creditors for such purposes. The replevin remedy is not characterized by appellant as "inhuman", which it was said described wage garnishment. *Sniadach, supra*, 395 U.S. at 340. The replevin statutes of 48 states and the District of Columbia[61] require a replevin plaintiff to post bond to secure prejudgment replevy. The bond in Florida is in double the value of the property,[62] conditioned to return the property to defendant if replevin is not finally adjudicated, and to pay for the loss of its use. (§78.07, *Fla. Stats.*) Unlike the wage-garnishment case, the replevin defendant is denied the use of certain items, which are not his "means to live", and he is guaranteed return of them or their value together with award for loss of their use in the event plaintiff does not obtain final judgment.

Conversely, the plaintiff in replevin must "insure" defendant against any damage which might result from wrongful replevy, in order to secure the writ. He thus binds himself to stand for any such damage. The fact

[61]Appendix A to brief of amicus, National Legal Aid and Defender Association.

[62]This is required in 45 states. *Ibid.*

that plaintiff's replevin bonds are relatively inexpensive is eloquent testimony to the fact that plaintiffs do not use the procedure frivolously.[63]

In addition to liability on the bond, replevin plaintiff must be mindful of legal sanctions for abuse of process, wrongful attachment, and malicious prosecution.[64] These remedies are available to remedy misuse of the writ, and can result in awards of punitive as well as compensatory damages.[65]

Constitutional adjudication need not and should not be undertaken simply because the procedure *can* be abused by unscrupulous persons. With potential exposure for wrongful or even mistaken use of the writ, business organizations would be foolish to use the procedure to "enforce a fraudulent debt." The same would be true of any solvent replevin plaintiff. The procedures and sanctions which now exist properly and fairly balance the parties' respective rights.

The remedy is a statutory adjunct of the parties' contract and the law of secured transactions. If, as a matter of policy, certain items of personalty are deemed to be important enough that a temporary loss of their use should not occur until final judgment, then it is the duty and function of the legislature to say so. The statute enacted in Connecticut is an example of the suitability of legislation

[63]In her affidavit, a legal secretary stated that she could secure a plaintiff's replevin bond in this case for $10.00, while defendant's requirements for a forthcoming bond would be cash security in the amount of the bond and premium of $10.00-$20.00. A. 4-6.

[64]See 21 *Fla. Jur.* 283 (Malicious Prosecution); 80 *A.L.R.* 580 (Abuse of Process); 2 *Fla. Law & Practice* 113 (Wrongful Attachment).

[65]Punitive damages are recoverable in tort actions involving malice, an element of the foregoing claims. 9 *Fla. Jur.* 452 (Damages).

for this purpose. If identified chattels cannot be used as security, they are not subject to repossession or replevy. But in such circumstances the credit seller has an opportunity to weigh this factor before extending credit. In May, 1971, the outstanding consumer installment credit measured $100,700,000,000.00;[66] the portion of it extended on security agreements all being to some degree available in consideration of creditor's right to possession of the security upon default in payment.[67] It is unreasonable to contend that appellant's interest in temporary use of a hi-fi and a disconnected stove is so great as to require alteration of the delicate balance of this segment of our economy. The present statutory procedure does what is reasonably necessary to balance and protect the respective rights of parties to a voluntary, private contract. This Court's interpretations of constitutional due process do not compel the result appellant seeks; to the contrary, they require due process approval of the statutory replevin acts.

B. Temporary change of possession of secured personalty pursuant to the writ of replevin is not a "Taking of Property" of the debtor for due process purposes.

The Fourteenth Amendment forbids any State from depriving any person of property without due process of law. In *Sniadach*, the "property" involved was "enjoyment of earned wages" during the proceeding. 395 U.S. 339. In *Goldberg*, the "property" was public assistance payments, about which it was said:

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[66]Standard & Poor's Trade and Securities Statistics, July, 1971, p. 6.

[67]See argument, *supra*, p. 14-25.

> "It may be realistic today to regard welfare entitlements as more like 'property' than a 'gratuity'. Much of the existing wealth in this country takes the form of rights that do not fall within traditional common-law concepts of property." 397 U.S. 262, footnote 8.

Sniadach was deprived of wages which were undoubtedly her property, within common-law or any other concepts; the *use* of them was found to constitute "property" for due process purposes. The welfare recipient in *Goldberg* was found to have sufficient "property" in public assistance payments, by virtue of the "entitlement" theory.[68] This action involves personalty which falls very clearly within traditional common-law concepts of property, and the property involved is not that of Mrs. Fuentes. It is submitted, therefore, that such temporary loss of use of personalty as is incident to replevy is not a taking of "property" within the meaning of the Fourteenth Amendment.

In *Sniadach* and *Goldberg* it was noted that loss of use of income could have dire economic consequences. *Sniadach*, presenting as it did an issue of cerditors' rights to pre-judgment debt enforcement, departed from a long-established rule stated succinctly in *McInnes v. McKay*, 127 Me. 110, 116, 141 A. 699, 702-03 (1928):

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[68]Even "entitlement" has its degrees. The benefits in *Goldberg* apparently rank as most nearly like property, for in other cases government benefit recipients have not been afforded the same procedural rights. *Hahn v. Gottlieb*, 430 F.2d 1243 (1st Cir. 1970), rents raised in government low-rent housing project without a hearing; *Torres v. New York State Dept. of Labor*, 321 F.Supp. 432 (S.D.N.Y. 1970), unemployment compensation terminated without a hearing.

> "But, although an attachment may, within the broad meaning of the preceding definition, deprive one of property, yet conditional and temporary as it is, and part of the legal remedy and procedure by which the property of the debtor may be taken in satisfaction of the debt, if judgment be recovered, we do not think it is the deprivation of property contemplated by the Constitution."[69]

The Court distinguished the *Sniadach* facts from "attachments generally"; the majority opinion did not imply that every temporary loss of use would henceforth be considered "property" for due process purposes.[70] Certainly not every temporary loss of use of an object carries consequences similar to those experienced with loss of use of wages. Here, appellant was obliged to do without a hi-fi and a stove which was disconnected and sitting on the back porch. Though the "property" concept for due process purposes is undoubtedly expanding to include modern forms, it does not follow that the right to uninterrupted possession of every secured chattel must be considered "property" of the debtor, when everything in the parties' contract and in the laws of the states is to the contrary.

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[69]"It is sufficient where only property rights are concerned, that there is at some stage an opportunity for a hearing and a judicial determination." *Ewing v. Mytinger & Casselberry*, 339 U.S. 594, 600 (1950) (citations omitted); *Phillips v. Commissioner, supra.* Due process *requires hearing* when a "significant" property interest is involved. *Boddie v. Connecticut*, 401 U.S. 371, 28 L.Ed.2d 113, 119 (1971).

[70]Mr. Justice Harlan did, in his concurring opinion. 395 U.S. at 343.

The traditional conditional sale was a "retain title" transaction, in which legal title to a chattel remained in the seller/lender until the contract price was paid. Under the parties' agreement, buyer was entitled to possession only so long as contract payments were made; upon default in payment, seller became entitled to possession of his security. See cases, pp. 73-14 *infra*. The statutory replevin remedy was thereby made available to conditional seller upon buyer's default. The phraseology is different under the Uniform Commercial Code, but the substance of the parties' relationship is not changed. In a secured transaction, the secured party has the right to possession upon default (§9-503, U.C.C.),[71] and "title" is not important. (§1-201(37), U.C.C.)[72] The argument in this case that "property" is being taken is even weaker than the argument made against pre-judgment attachment. In replevin, plaintiff assserts a possessory right to a specific item; in attachment, plaintiff asserts a non-specific claim against all of defendant's property to satisfy a claim not necessarily related to the items attached.

The value of the replevin plaintiff's possessory interest in the chattel is at least equal to defendant's, and often it is much greater.[73] The nature of the parties' relationship and the nature of the loss of use is so significantly different from the *Sniadach* situation that "it is (not) a deprivation of property contemplated by the Constitution." *McInnes v. McKay, supra.*, 141 A. 702-03.

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[71]§679.9-503, *Fla. Stats.*

[72]§671.1-201, *Fla. Stats.* The Uniform Consumer Credit Code, §5-103, makes repossession of consumer goods purchased for $1,000 or less, an election of remedies which procludes deficiency judgment.

[73]See discussion, *supra* pp. 20-21, about default experience of automobile financers. A large percentage of all auto repossessions occur very soon after sale, at which time buyer has almost no equity in the security.

C. Modern statutory replevin combines ancient and common law remedies for retaking personalty, and complements private repossession rights in effect throughout the United States.

Through various forms of actions, the common law provided means to recover possession of personalty. The Florida statutory replevin procedure is typical of the consolidated, statutory remedy now available to gain possession of personalty.[74] A brief historical perspective of the remedy is useful.

The origins of replevin apparently pre-date the common law; the remedy is among the most ancient civil remedies.[75] It developed due to abuses of an ancient practice which allowed a creditor or landlord to collect security for payment of rental or debt by physically appropriating property of the debtor. This activity was known as "distress"; it was utilized without judicial process.[76] To replevy, the one distrained upon applied to the proper officer, and his distress was returned to him upon giving security to try the right of taking or distraining.[77] The writ was sued out from Westminster, commanding the sheriff to return the

[74]See Appendix A to Amicus Brief of National Legal Aid and Defender Association, surveying the remedy in the United States which is substantially correct.

[75]R. *Glanvill, Treatise On The Laws And Customs Of The Realm Of England*, bk. 12, ch. 12 (G. Hall ed. 1965).

[76]3 *Blackstone Commentaries*, 6; *Gilbert on Distresses*, 4.

[77]This writ was called "replegiare facias", from which the word replevin derived. The first syllable (re) is equivalent to the English word "again" and the last two syllables (plegiere from Latin, or Plevir from Old French) means to "recover the pledge". Cent. Dict., 3 *Black.* Comm., 13.

distress to the owner and to see justice done between the parties. (3 *Black. Comm.*, 146) In 1267, the procedure was codified, and was made issuable locally rather than from Westminster. (Statute of Marlbridge, 52 Henry III, Ch. 21).

The taking of the distress originated in the rough exercise of pure force, for which the will of the taker was the sole warrant. According to Wells, the written history of the law was not explicit on the subject, but enough remains to justify the belief that before the law had attained vigor enough to enforce its mandates, or compel that respect which is yielded to superior power, men employed their own individual force, and indemnified themselves for any real or supposed injury by seizing from their adversary enough of his property to compensate them for their loss.[78] The possession of sufficient force being the only prerequisite to the seizure, such a taking was resisted by means of recapture and reprisals. The history of the law of replevin for the first five centuries is but a panoramic view of the struggles of men whose methods of resolving disputes had been barely civilized.[79] The necessity of a judicial process in the action was summed up by Pollack and Maitland:[80]

> "Had we to write legal history out of our heads, we might plausibly suppose that in the beginning law expects men to help themselves when they have been wronged, and that by slow degrees it substitutes a litigatory procedure for the rude

[78] *Wells on Replevin*, 4 (1880).

[79] See, *Cobbey on Replevin*, 2 (1900).

[80] Pollack and Maitland, *History of English Law*, Vol. II, at 572.

> justice of revenge. There would be substantial truth in this theory. For a long time law was very weak, and as a matter of fact it could not prevent self-help of the most violent kind. Nevertheless, at a fairly early stage in its history, it begins to prohibit in uncompromising terms any and every attempt to substitute force for judgment. . . . This at all events was true of our English law in the thirteenth century."

Numerous common law remedies existed to recover possession of property, the form of action depending on the facts. Repleven remedied a wrongful taking, detinue a wrongful withholding, trover for conversion, etc. In time, the various forms were consolidated by statute, most often under the name "replevin" or "claim and delivery."[81] The basic ingredient of common law replevin was retained in the statutory form, namely, that the remedy permitted possession of the personalty involved be resumed by the owner pending the outcome of the suit.[82]

Widespread use of the statutory remedy must be viewed as both a cause and effect of the phenomenal increase in credit buying. Consumer credit transactions could be effectively collateralized, and consumers were able to have immediate possession and use of chattels, on the con-

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[81]See, Appendix A to Amicus brief of National Legal Aid and Defenders' Association.

[82]Although this case, and undoubtedly a large percentage of all replevin actions, arises out of a consumer credit transaction, the remedy is still available to regain possesison of property wrongfully taken or converted, e.g. *Harman-Hull Co. v. Burton*, 106 Fla. 409, 143 So. 298 (1932); *Evans v. Kloeppel*, 72 Fla. 267, 73 So. 180 (1917). It would seem anomalous if due process were held to require notice and hearing before stolen or converted property could be re-taken.

dition that prescribed payments be regularly made, and on the condition that the right to possession would cease when payments ceased. If payment ceased, creditor had the right to possession of the chattel while the parties settled any dispute that might exist about debtor's default. [See, 1 Gilmore, *Security Interests in Personal Property*, 67 & 68, (1965)]. To a considerable extent, self help remained a creditor's remedy. *Ibid.*

The Uniform Commercial Code was developed in the context of America's consumer economy, and made provisions for the secured consumer transaction, among many others. The Code was first enacted in Pennsylvania in 1953;[83] and has since been made the law of all states, except Louisiana. The U.C.C. has also been enacted in the District of Columbia and the Virgin Islands. *Ibid.* In 51 jurisdictions, it is provided that:

> "§9-503. Secured Party's Right to Take Possession After Default. — Unless otherwise agreed a secured party has on default the right to take possession of the collateral. In taking possession a secured party may proceed without judicial process if this can be done without breach of the peace or may proceed by action. . . . Without removal a secured party may render equipment unusable, and may dispose of collateral on the debtor's premises under Section 9-504."[84]

It is thus the considered judgment of the Permanent Editorial Board of the Uniform Commercial Code and the legislatures of 50 jurisdictions and the Congress of the United States that secured creditors should have the right

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[83] *Martindale-Hubbel Law Directory*, Uniform Acts, 3722 (1971).

[84] *Id*, at 3776; *Fla. Stats.* §679.9-503.

to possession of their collateral when payments cease. They are entitled to possession forthwith, and if no breach of peace is thereby occasioned they can take possession without judicial process of any sort. The replevin remedy is available when breach of peace might otherwise occur.[85] The value of and the purpose for the remedy, then, is perhaps the strongest and most important in civil law, to "prohibit in uncompromising terms any and every attempt to substitute force for judgment." Pollack and Maitland, *History of English Law, supra.* The right to possession is established by history and by contemporary standards; the remedy simply provides the means to enforce the right when it cannot be enforced privately and peaceably. It compels that respect which is yielded to superior authority, and which is necessary for peaceful settlement of civil actions. No more basic or important social purpose exists to justify a civil remedy.

The respective rights of creditors and debtors to possession of collateral is a subject particularly suited for legislation. The existence and form of the U. C. C. and the various state replevin enactments demonstrate that. The framers of the U. C. C. considered and rejected one aspect of the argument made here by appellant, namely that a conditional sales purchaser who has paid substantially all the contract price should not be subject to pre-judgment replevy.[86] The element of inexpensive and prompt repos-

[85]The code also allows use of civil remedies in lieu of private action. §9-503, U.C.C.

[86]The May, 1949, draft of the U.C.C. provided in §7-605 that notice of repossession be given if 60% or more of the contract price were paid. This notice requirement was eliminated in later drafts. In England, the Hire-Purchase Act of 1965, c. 66, p. III, provides that repossession may not be made without court order when more than one-third of the purchase price is paid.

session is important to the necessary salvage that must be undertaken when default occurs. The Code default provisions and the history of the conditional sale concept appreciate this and reflect recognition of the need for prompt, efficient, inexpensive creditor remedies following debtor default.[87] It is not properly the province of courts to engraft procedures into the remedy which may alter the economic and legislated balance.

The virtually unanimous historical and contemporary acceptance of the legality and propriety of "attachments generally" constitutes an unusually compelling argument in support of the constitutionality of the Florida replevin procedure. We do not deal here, as was the case in *Sniadach*, with "a most inhuman doctrine." 395 U.S. at 340. The procedure under attack here is not one which applies in a limited number of jurisdictions, as was the case in *Sniadach*. In various forms, pre-judgment levies have existed as creditors' remedies in the United States, and they have been approved "generally" by this Court.

Their long-continued existence and universal acceptance is a classic illustration of Mr. Justice Holmes' famous observation that:

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[87]This concern is far from "wailing at the wall." See, Kripke, *Consumer Credit Regulation: A Creditor Oriented Viewpoint*, 68 Colum. L. Rev. 445, 447-55, regarding the disappearance as independent commercial finance companies of three national level companies due to very low and declining profits. Also, Kripke, *Gesture and Reality In Consumer Credit Reform*, 44 N.Y. U. L. Rev. 1, 3-5.

"The Fourteenth Amendment, itself a historical product, did not destroy history for the States and substitute mechanical compartments of law all exactly alike. If a thing has been practiced for two hundred years by common consent, it will need a strong case for the Fourteenth Amendment to affect it, . . . "[88]

POINT III

THE FOURTH AMENDMENT DOES NOT PROHIBIT A PEACEABLE SEIZURE OF COLLATERAL UNDER WRIT OF REPLEVIN, WHICH ENFORCES A CONTRACTUAL RIGHT OF REPOSSESSION.

Appellant's Point II presents her constitutional attack upon § 78.10, *Fla.Stats.*, as violating the Fourth Amendment prohibition against "unreasonable searches and seizures." The lower court concluded — as we submit rightly so — that this section and the others under attack "to the extent that its provisions were before the Court by virtue of an actual controversy in this case, is constitutional." (A. 68); 317 F.Supp. at p. 959.

A. Appellant has no standing to question the constitutionality of section 78.10, Fla.Stats. and even if she did, the seizure here was not unreasonable.

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[88] *Jackman v. Rosenbaum*, 260 U.S. 22, 31 (1922).

Despite the fact that § 78.10, *Fla.Stats.*, permits a forcible entry into a house, building or other enclosure, if, after public demand, delivery of the property is not made, those provisions were not invoked here. The deputy sheriff executing the writ was admittedly invited into the Fuentes home;[89] he did not forcibly enter. Although both appellant and her daughter-in-law, Mrs. Delgado, were made aware of the purpose of the deputy's visit and the effect of the replevin writ he was serving, it was not appellant who voiced any objection to the deputy's repossession of the subject personalty, but Mrs. Delgado, who had no interest in the property or standing to object to its repossession. (A. 27, 28). It was Mrs. Delgado who wanted the assistance of appellant's son-in-law, Mr. Leon, for advice in the matter. (A. 28). And, Mr. Leon's only objection was that, according to *his* attorney, a court proceeding was necessary for repossession. (A. 28). Upon the deputy's explanation of the fact that there was a court action in which the replevin writ was issued, no further objection was raised by anyone and the deputy was permitted to repossess the stove and hi-fi. (A. 28) The stove was actually disconnected and located on an outside open porch, exposed to the elements, while the hi-fi was pointed out in the living room. (A. 28).

The deputy sheriff serving the writ of replevin had no occasion to exercise the authority granted by Section 78.10 to break open or into the Fuentes home. The entry

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[89]Evidence was in dispute as to the time, but not the fact, of invited entry, the deputy contending he was invited into appellant's home immediately after announcing his presence at the door, while appellant asserted the invitation was not extended until after her son-in-law's arrival. (A. 27).

was entirely peaceable and without force[90] The forcible entry provisions of § 78.10 not having been invoked, their validity is not subject to attack here.

One can be heard to question the validity of a statute "only when and so far as it is being or is about to be applied to his disadvantage." *Utah Power & Light Co. v. Pfost*, 286 U.S. 165, 186 (1932) and cases cited therein. One has no standing to attack the constitutionality of a statute unless he "has sustained or is immediately in danger of sustaining some direct injury as the result of [the statute's] enforcement." *Massachusetts v. Mellon*, 262 U.S. 447, 448 (1923); *Cramp v. Board of Public Instruction*, 368 U.S. 278 (1961). A hypothetical threat is not enough. *United Public Workers v. Mitchell*, 330 U.S. 75 (1947). A genuine and present controversy, not merely a possible or conjectural one, must exist with reference to the statute's validity. *New Orleans v. Benjamin*, 53 U.S. 411 (1894); *Defiance Water Co. v. Defiance*, 191 U.S. 184 (1923).

No breaking of or into the home of appellant having occurred here, there is no genuine Fourth Amendment controversy. In short, under the undisputed facts, appellant was and is without standing to question the constitutionality of the provisions of § 78.10.

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[90]As the lower court found: "This case involves a peaceable entry." (A. 67); 317 F.Supp. at p. 958. In fact appellant does not complain that this statutory power is routinely abused, an implication she makes in argument that the writ should not issue at all without a trial. Nothing in this record by way of evidence or empirical study indicates that the procedure is used in the fashion which is the basis of appellants arguments.

It is axiomatic that only such "searches and seizures" which are "unreasonable" are proscribed by the Fourth Amendment, e.g. *Wyman v. James*, 400 U.S. 309 (1971); *Terry v. Ohio*, 392 U.S. 1 (1968). As stated by the *Epps*[91] court: "The conduct herein complained of does not descend to the level of unreasonableness . . . " No threats or intimidations by the deputy sheriff were made to appellant. No forcible entry was exerted. No force was used. Simply, a civil writ of replevin was served in a peaceable manner, and after explaining its contents and effect, the officer removed the chattels without force or objection. By the test of balancing the need to search [or seize] against the invasion which the search [or seizure] entails[92], the "invasion" was so negligible that it in no event could be declared "unreasonable".

The thrust of appellant's search and seizure attack appears to be predicated upon her counsel's unsubstantiated fear of the worst conceivable situation that could occur if the forcible entry (breaking) provisions of § 78.10 *Fla.Stats.*, were utilized; e.g., an overzealous deputy, after receiving no response to his light knock on the door at 2:00 A.M., breaks into the house, forcibly pushes the mother and children out of the beds onto the floor and rapidly flees into the night, taking with him the family's only crib and mattress. But, appellant has not demonstrated that the breaking provisions of the statutes are or have been used with any frequency, or at all; or that such use as has occurred could amount to an unconstitutional search and seizure.

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[91]*Epps v. Cortese*, 326 F.Supp. 127, 137 (1971).

[92]*Camara v. Municipal Court*, 387 U.S. 523, (1967).

There was not breaking or forcible entry here and the repossession, under the undisputed facts, was entirely reasonble.

B. The Fourth Amendment has no application to a civil seizure of property pursuant to a court writ.

For as long as this Court has been construing and interpreting the Fourth Amendment restrictions on unreasonable searches without warrant, it has defined those rights in context and terms of enforcement of criminal liability, not civil liability, e.g. *Murray's Lessee v. Hoboken Land and Improvement Co.*, 59 U.S. 272 (1856); *Boyd v. United States*, 116 U.S. 616 (1886); *Frank v. Maryland*, 359 U.S. 60 (1959); *Camara v. Municipal Court*, 387 U.S. 523 (1967); *See v. City of Seattle*, 387 U.S. 541 (1967); *Wyman v. James*, 400 U.S. 309 (1971).[93]

The Fourth Amendment itself was the result partially of prior judicial recognition that the right against self-incrimination must be reinforced by the right to be free from unreasonable searches. In an opinion recognized as the judicial forerunner to the Fourth Amendment,[94] Lord Camden put the rights in juxaposition in *Entick v. Carrington*, 19 Howell's State Trials 1029, 1073 (1765):

> "It is very certain, that the law obligeth no man to accuse himself; because the necessary means of compelling self-accusation, falling upon the innocent as well as the guilty, would be both cruel

[93]Other Courts have done likewise: *935 Cases more or less, etc.*, 136 F.2d 523 (6th Cir. 1953), *U. S. v. Eighteen Cases of Tuna Fish*, 5 F.2d 979 (D.C. W. Va. 1925).

[94]The Fourth Amendment significance of *Entick* was expressly recognized by this Court in its *Boyd* decision.

> and unjust; and it should seem, that search for evidence is disallowed upon the same principle. Theretoo the innocent would be confounded with the guilty."

In the course of its decision in *Murray's Lessee v. Hoboken Land and Improvement Co.*,[95] this Court expressly held that the Fourth Amendment "has no reference to civil proceedings for the recovery of debts." Some years later,[96] that opinion was expressed more definitively, that "the entry upon premises, made by a sheriff or other officer of the law, for the purpose of seizing goods and chattels by virtue of a political writ, such as an attachment, a sequestration or an execution, is not within the prohibition of the Fourth Amendment."

Both *Murray's Lessee* and *Boyd* dealt with the question of substance and form. Whether Fourth Amendment provisions applied in the case of a distress warrant issued without oath or affirmation for taxes due was at issue in *Murray's Lessee* (59 U.S. at 285-286):

> "The remaining objection to this warrant is, that it was issued without the support of an oath or affirmation, and so was forbidden by the 4th article of the Amendments of the Constitution. But this article has no reference to civil proceedings for the recovery of debts, of which a search warrant is not made part. The process, in this case, is termed, in the Act of Congress, a warrant of distress. The name bestowed upon it cannot

---

[95] 59 U.S. 272, (1856).

[96] *Boyd v. United States*, 116 U.S. 616, 624 (1886).

> affect its constitutional validity. In substance, it is an extent authorizing a levy for the satisfaction of a debt; and as no other authority is conferred, to make searches or seizures, than is ordinarily embraced in every execution issued upon a recognizance, or a stipulation in the admiralty, we are of opinion it was not invalid for this cause.

And in *Boyd* (116 U.S. at 634): ,

> "The information, though technically a civil proceeding, is in substance and effect a criminal one. . . . we think that they are within the reason of criminal proceedings for all the purpose of the fourth Amendment. . . ."

In *Camara v. Municipal Court*, 387 U.S. 523 (1967), and *See v. City of Seattle*, 387 U.S. 541 (1967), the search and seizure provisions of the constitution were applied to governmental intrusions which were quasi-criminal in nature, yet were still "true search[es] for violations."[97]

Camara involved the right of San Francisco Housing Code Inspectors to make area inspections of housing facilities to ascertain the existence of Housing Code violations. (387 U.S. at 526). Camara refused to allow the search, and was charged under the "catch-all" violation provision of the Code which punished alike violations of the Code and refusal to comply with inspectors' efforts to administer it. (*Ibid*). This governmental inspection was held to be a "search" subject to the warrant/probable cause restrictions of the constitution. The inspection was not made in pursuance of any civil remedy; it was part of a routine,

[97] *Wyman v. James*, 400 U.S. 309, 325 (1971).

governmental inspection of all residences in the area for the purpose of ascertaining the existence of Housing Code violations. Violations of the Code were misdemeanors. No contention was made that the Code could not be successfully administered within the confines of a search warrant requirement. (387 U.S. at 533). This Court did not rule that all inspections must be performed pursuant to warrant issued upon some sort of judicial finding of probable cause. Rather, it held:

> "Thus, as a practical matter and in light of the Fourth Amendment's requirement that a warrant specify the property to be searched, it seems likely that warrants should normally be sought only after entry is refused unless there has been a citizen complaint or there is other satisfactory reason for securing immediate entry." 387 U.S. at 539-540.

The Court did not require a warrant be issued for every inspection, only those when entry was refused. Nor did it require that warrant be issued in every case where entry is refused. Provision was made, for entry without a warrant upon a citizen's complaint or when other satisfactory reason appears for immediate action. *See* simply extended the *Camara* holding to governmental searches of business as well as residential premises. 387 U.S. at 546.

Wyman v. James, 400 U.S. 309 (1971), made clear that, when it decided *Camara* and *See*, the Court had not abandoned the criminal-civil distinction for search and seizure purposes. There it was claimed that certain home visitation (required by New York state and city social

services in connection with administration of the Aid to Families with Dependent Children program) constituted a search for constitutional purposes. The purpose of the visit included ascertaining whether aid should continue; a recipient could have benefits terminated for refusal to allow the visits. (27 L.Ed.2d 410)

> "It is true that the governing statute and regulations appear to make mandatory the initial home visit and the subsequent periodic 'contacts' (which may include home visits) for the inception and continuance of aid. It is also true that the case worker's posture in the home visit is perhaps in a sense, both rehabilitative and investigative. *But this latter aspect, we think is given too broad a character and far more emphasis than it deserves if it is equated with the search in the traditional criminal law context.* (27 L.Ed.2d at 414)

The Court also noted that, even if the visit was a search, it was not proscribed by the Fourth Amendment since it was not unreasonable, quoting Chief Justice Warren:

> " 'the specific content and incidents of this right must be shaped by the context in which it is asserted.' "[98]

The distinguishing factors of *Camara* and *See* were that "[e]ach concerned a true search for violations . . . each case arose in a criminal context . . ." (*Wyman*, 27 L.Ed.2d 418). Here, however, governmental intervention in other-

[98]27 L.Ed.2d 414, citing *Terry v. Ohio*, 392 U.S. 1, 9 (1968).

wise private action is involved. "The step is not an automatic one."[99]

Never has this Court indicated that Fourth Amendment restrictions applied to enforcement of purely civil processes. *Camara* and *See* certainly did not present any such case; both involved governmental functions which were carried out in a quasi-criminal context. Appellant attempts to provide the criminal element here by saying that a citizen can be subject to criminal prosecution for hindering a law officer in the performance of his duty.[100] But this is not an incident of the replevin procedure; she would be equally susceptible to that charge whether a search warrant were issued or not. The essential purpose in *Camara* and *See* was the search for violations of law. That is not the object of replevin. No greater potential for criminal charges exists in the replevin context than in the enforcement of executions after judgment, or the disobeyance of a policeman in the exercise of any official duty. People are obliged not to hinder policemen in the course of their duties; and the fact that society enforces that dictate with criminal liability does not turn every civil process into a Fourth Amendment search. *Camara* and *See* were both different; there the specific authority to inspect carried criminal responsibility for refusing access.

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[99]Comment, *Laprease* and *Fuentes:* Replevin Reconsidered, 71 Colum. L.Rev. 886, 900 (1971).

[100]The suggestion by plaintiff (p. 45 and footnote 18 on p. 45) that property taken under a replevin writ could be used as evidence in support of a charge of disposing of property subject to alien under § 818.01, *Fla. Stats,* is ill-founded, inasmuch as that section was repealed by implication by the passage of Ch. 65-254, *Laws of Florida,* 1065 (Section 679. 311, *Fla. Stats.) Opinion of Attorney General* 071-6, January 25, 1971 (SA 1-4).

The Fourth Amendment never has applied to intrusions by private individuals, even wrongful ones, but only to strictly governmental actions. *Bordeaux v. McDowell*, 256 U.S. 465 (1921). The aid of the sovereign provided for enforcement of private contractual rights lawfully exacted, should not render it applicable to bar a peaceful repossession through execution of a court-issued replevin writ.

There is a vast distinction, moreover, between intrusions on privacy by the government to search for evidence for violations of law and entries to recover possession of property to which one is entitled and which is wrongfully withheld or detained. As this Court said in *Davis v. United States*, 328 U.S. 582, 593 (1946):

> And, where one is seeking to reclaim his property which is unlawfully in the possession of another, the normal restraints against intrusion on one's privacy, as we have seen, are relaxed.

See also, *Boyd v. United States*, supra[101] and *Harris v. United States*, 331 U.S. 145 (1947)

Indeed, this is the predicate of replevin procedures. § 78.01, *Fla.Stats.*, prescribes issuance of the replevin writ only for goods or chattels "wrongfully detained by any other person or officer".

Consideration too must be given to the fact that the replevin statutes of the majority of states have long ex-

[101]Noting the distinction between the seizure of forfeited goods or those liable to duties and the search for and seizure of a man's own private papers for the purpose of securing evidence against him, the Court said (116 U.S. at p. 623):

> "In the one case, the Government is entitled to the possession of the property; in the other it is not."

pressly authorized forcible entries (Appendix A to brief of American National Legal Aid and Defenders Association) or have been construed to imply such authority. (*Laprease* and *Fuentes:* Replevin Reconsidered, Vol. 71, Colum L. Rev., 886, 900) Long usage, acquiesced in by the courts, "goes a long way to prove that there is some plausible ground or reason for it in the law or in the historical facts which have imposed a particular construction of the law favorable to such usage." *Boyd v. United States*, supra, 116 U.S. at 622. Continued and long usage of such statutorily authorized procedures and the Courts' recognition of them should not be lightly cast aside.

As with her due process contentions, appellants search and seizure arguments, if valid at all, are too broadly stated. There is no more reason to require issuance of a warrant for every replevy than there was reason to require housing inspectors to have them for every inspection. (*Camara v. Municipal Court*, 387 U.S. at 539-540). Indeed, such a procedure would render replevin useless in those cases when summary replevy is necessary and proper. If this Court departs all history and precedent, and requires search warrant procedures in service of civil processes, it should certainly require no more than it did of the San Francisco Housing Authorities.

When all was said and done in *Camara*, housing inspectors were not required to have a warrant to inspect every house or building; nor should civil plaintiffs in replevin actions be required to have any more for the routine service of writs of replevin.[102] *If* there is any warrant re-

[102]Here, even more than *Camara*, "Because the inspections are neither personal in nature nor aimed at the discovery of evidence of crime, they involved a relatively limited invasion of the . . . citizens privacy" 387 U.S. at 537.

quirement at all, it "should normally be sought only after entry is refused unless there has been a citizen complaint or there is other satisfactory reason for securing immediate entry." 387 U.S. at 539-540. Some allowance must be made for the fact that there are people who run off with things, or destroy them to avoid repossession; there must be some appreciation of the myriad of private civil relationships in which the remedy operates.

It remains more to the point to say that the Fourth Amendment was not designed to intervene in private contract disputes, and the enforcement of them. There are circumstances in which solution of civil remedies requires the arm of the government in order to preserve peace while civil laws are effected. To engraft on those procedures a body of law born and reared in the context of criminal liability serves no useful social or legal purpose. There is nothing in the words of the Constitution or the prior decisions on this Court which requires the processes of civil litigation to be so burdened.

C. The parties' contract authorized a peaceable repossession of the subject personalty by Firestone.

Under the contract between appellant and Firestone, the latter retained "title and *right of possession* of said merchandise" until fully paid for and appellant expressly agreed with Firestone that, "in the event of default in any payment or payments", Firestone might repossess the merchandise. (A. 32, 34). Under Section 679.9-503, *Fla. Stats.*,[103] Firestone, as a secured party, had a right, upon appellant's default, to retake the merchandise without re-

[103]This Uniform Commercial Code provision is in effect in all of the states, save Louisiana.

sort to any judicial proceedings whatever, if it could be done without breach of the peace.[104] Or, as it did here, it had the right to utilize statutory replevin procedures. *Ibid.* If it is reasonable for one to use self-help—without judicial process or bonding requirements—to peacefully repossess personalty in which he has a contractual security interest, even to the extent of going on to another's property to do so, are not court processes for the recovery of possession (which give defendant the benefit of security protection, a right to return of the property upon posting a forthcoming bond, and a right to an ultimate trial upon the merits of the claim to possession) even more reasonable? And, the aid of a court officer executing judicial process for repossession pursuant to a contractual right will, most certainly, diminish instances of breaches of peace when the parties are unable to use private remedies.

The court below put the issue in its proper context: "Whether, absent authorization to break down the door or otherwise enter forcibly, the Fourth Amendment prohibits parties to a conditional sales contract from contracting for peaceable repossession." The lower court concluded, and we submit correctly (317 F.Supp. at pp. 958, 959):

> "We think the answer is obviously an emphatic no. The Fourth Amendment does not prevent private parties from contracting, as the plaintiff here did, that one may peaceably enter the other's house.[105]

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[104]This statute has recently withstood constitutional attack. *McCormick v. First National Bank*, 322, F.Supp. 604 (1971).

[105]*Bumper v. North Carolina*, 391 U.S. 543 (1968), cited by appellant, can have no relevance here, as the lower court did not hold that plaintiff's consent to seizure at the time the writ was served

Appellant attacks the lower court's reasoning in this regard as "misdirected because appellant does not challenge a private invasion of protected privacy but rather a state authorized and implemented intrusion pursuant to the lawful execution of a replevin writ." (p. 38, Brief of Appellant). The fact that Firestone invoked authorized judicial processes to enforce this private contractual right should not detract from its validity nor render its enforcement violative of the Fourth Amendment. There certainly is nothing injurious to public interest or contrary to public policy about a contract permitting peaceable repossession of chattels by a conditional seller upon the buyer's default in payment. The facts here undeniably show a peaceable repossession of the subject personalty. Nor, does the fact that the statute prescribed aid of the sovereign in enforcing this private contractual right render applicable here Fourth Amendment prohibitions. As one legal author recently put it:

> "Simply because a state replevin statute provides for the intervention of a sheriff in such cases, and thus minimizes the danger of violent confrontation, is it necessarily logical to require as a corollary thereto that the seller's otherwise existing rights be restricted by the requirement of obtaining a search warrant?" (Vol. 71, *Colum. L. Rev.* 866, 901)

Nothing in our history or in our constitutional law would require such a result.

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amounted to a waiver of her Fourth Amendment rights. There is certainly a basis for such a finding, nonetheless, since appellant herself made no objection to the repossession of the subject property. *Davis v. United States, supra.*

Appellant also urges that the language of the contract between appellant and Firestone does not specifically authorize entry upon appellant's premises. The presence or absence of such a provision is of no consequence. The very retention, by contract, of title to property carries with it the right to return of the property upon default by the buyer, *e.g.*, *Goldberg v. List*, 11 Cal.2d, 389, 79 P.2d 1086 (1938); *Blackford v. Neaves*, 23 Ariz. 501, 205 P. 587 (1922); *Stowers Furniture Co. v. Brake*, 158 Ala. 639, 48 So. 89 (1908); *Pels & Co. v. Cambridge Architectural Iron Works*, 192 Mass. 13, 77 N.E. 1152; *Smith v. Barber*, 153 Ind. 323 (Miss. 1899); *Williams v. Williams*, 23 So. 291 (1898); 55 *A.L.R.* 184, 146 *A.L.R.* 1331. And the courts have uniformly held parties to have the power to contract for the retaking by the seller of the property upon the buyer's default without resort to judicial processes, if he can do so peaceably. *Percifield v. State*, 93 Fla. 247, 111 So. 519 (1927); *Universal Credit Co. v. McKinnin*, 166 Fla. 849, 143 So. 778 (1932); 9 *A.L.R.* 1180; 105 *AL.R.* 926; 99 *A.L.R.2d* 360. In fact, the contracted right to repossession upon default itself carries with it the right to "peaceably enter upon the premises of the [buyer]."[107] *Willis v. Whittle*, 82 S.C. 500, 64 S.E. 410 (1909); *Soulios*

[106]Some courts have even sanctioned the use of necessary force, including forcible entry, for repossession pursuant to contract. 9 *A.L.R.* 1180. Contractual stipulations expressly conferring the right of entry upon the buyer's premises to repossess in the event of buyer's default have been construed to confer upon the seller an irrevocable license to forcibly, if necessary, enter the buyer's dwelling house. *Lambert v. Robinson*, 162 Mass. 34, 37 N.E. 753 (1894); *Walsh v. Taylor*, 39 Mass. 592 (1874); *W. T. Walker Furniture Co. v. Dyson*, 32 App.D.C. 90, 19 L.R.A. (N.S.) 606.

[107]Parties may certainly expressly contract for the seller to enter upon the buyer's premises to recapture possession. *C.I.T. Corporation v. Reeves*, 112 Fla. 424, 150 So. 638 (1933); *Prosser on Torts*, (2d Ed.) p. 103.

v. Mills Novelty Co., 198 S.C. 355, 17 S.E.2d 869 (1941); *Prosser on Torts* (2d Ed.) p. 103 (footnote 45); See *Besner v. Smith*, (Munic.Ct.App., D.C. 1962) 178 A.2d 924.[108]

Appellant cannot complain here, much less make a constitutional case, of that to which she agreed as a condition of her time purchase—an entirely peaceable repossession of the merchandise upon her default in payment.

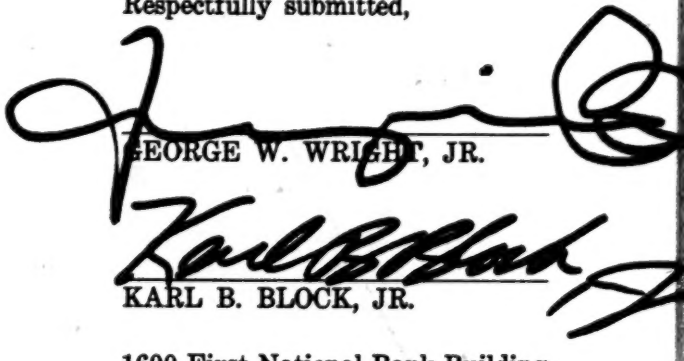
[108]Analogous here is the holding of the court in *Besner*, even in a self-help repossession, that (at p. 926):

> "After numerous written requests to pay the arrears, the husband finally told the seller that if he didn't pay the amount then due after a short period he could come by the house and pick up the set. This the seller did.*** The wife does not disclaim that she admitted the seller's agent; she makes no charge that there was an assault upon her in the house or that force was used in entering or in taking and removing the set; and she raised no objection to its removal."

CONCLUSION

For the foregoing reasons and based upon the foregoing authorities, the Final Judgment for the appellees, upholding the constitutionality of Florida's statutory replevin procedures, should be affirmed.

Respectfully submitted,



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PROOF OF SERVICE

I HEREBY CERTIFY that on this 28th day of September, 1971, service of three copies of the printed brief and appendix of Appellee, The Firestone Tire and Rubber Company, was duly made upon the following by depositing same in a United States mail depository, with first class (or air mail as to those residing more than five hundred miles from Miami, Dade County, Florida) postage prepaid: BRUCE S. ROGOW, ESQ., DONALD C. PETERS, ESQ., RENE V. MURAI, ESQ., Legal Services of Greater Miami, Inc., 622 N. W. 62nd Street, Miami, Florida 33150; and C. MICHAEL ABBOTT, ESQ., 2837 Pittsfield Boulevard, Ann Arbor, Michigan, Attorneys for Appellant; DANIEL S. DEARING, ESQ., Office of the Attorney General, The Capitol, Tallahassee, Florida, Attorney for Appellee, Robert L. Shevin, Attorney General of the State of Florida; ALLAN ASHMAN, ESQ., R. PATRICK MAXWELL, ESQ., 1155 East 60th Street, Chicago, Illinois 60637, Attorneys for Amicus Curiae, National Legal Aid and Defender Association; THOMAS L. EOVALDI, ESQ., Professor of Law, Northwestern University, School of Law, Chicago, Illinois, Of Counsel for Amicus Curiae, National Legal Aid and Defender Association; JEAN CAMPER CAHN, ESQ., BARBARA B. GREGG, ESQ., 1145 19th Street, N.W., Suite 509, Washington, D.C. 20036, Attorneys for Amicus Curiae, Urban Law Institute of the National Law Center of George Washington University; BLAIR C. SHICK, ESQ., MARK BUDNITZ, ESQ., DONALD FOSTER, ESQ., RICHARD A. HESSE, ESQ., 38 Commonwealth Avenue, Brighton, Massachusetts 02135, Attorneys for Amicus Curiae, National Consumer Law Center of Boston College Law School; HARRY N. BOUREAU, ESQ., PHILLIP G. NEWCOMM, ESQ., ERIC

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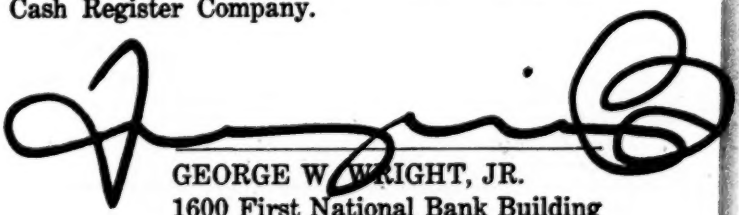

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SUPPLEMENTAL APPENDIX OF APPELLEE, FIRESTONE

STATE OF FLORIDA
DEPARTMENT OF LEGAL AFFAIRS

The Capitol
Tallahassee, Florida 32304

January 25, 1971

Honorable Rom W. Powell
County Solicitor
Criminal Court of Record
Orange County Courthouse
Annex-Room 401
Orlando, Florida 32801

071-6

Dear Mr. Powell:

Your letter dated December 30, 1970 has been received. You request the opinion of this office as to whether Section 679.311, Florida Statutes, 1969, supersedes the provisions of Section 818.01 thereof.

Section 679.311 which became law with the passage of Chapter 65-254, Laws of Florida 1965, effective at 12:01 a.m., January 1, 1967, provides as follows:

> "679.311 **Alienability of debtor's rights: judicial process.**—The debtor's rights in collateral may be voluntarily or involuntarily transferred (by way of sale, creation of a security interest, attachment, levy, garnishment or other judicial process) notwithstanding a provision in the security agreement prohibiting any transfer or making the transfer constitute a default."

Section 818.01 provides in pertinent part as follows:

> "(1) Whoever shall pledge, mortgage, sell, or otherwise dispose of any personal property to him belonging, . . . which shall be subject to any written lien, . . . without the written consent of the person holding such lien, . . . shall be punished by a fine not exceeding five hundred dollars, or by imprisonment not exceeding one year."

It is apparent that Section 679.311 permitting a debtor to sell his interest in collateral which may be subject to a written lien is in conflict with Section 818.01 which provides that a person who so disposes of collateral without the written consent of the lienor is guilty of a misdemeanor. Although Section 818.01 has not been expressly repealed in its entirety, it is my opinion that it may yield to the conflicting provisions of Section 679.311.

It is well settled that where two legislative acts are in conflict with each other, the one last passed, being the latest expression of the legislative will, must govern even though it contains no repealing clause. **Routh v. Richards**, 138 So. 69 (Fla. 1931). As above indicated, Section 679.311 became law with the passage of Chapter 65-254 in 1965. Section 818.01 has been on the books in substantially its present form since 1923. See Chapter 9288, Laws of Florida 1923.

Section 680.103, Florida Statutes, 1969, is a general repealer statute and provides that: "Except as provided in Section 680.14, all laws and parts of laws inconsistent with this code are repealed." This statute is indicative of the legislative will and is sufficient to accomplish the

stated purpose. I say this although I am fully aware that in some jurisdictions, such a repealing statute adds nothing to the repealing effect of the act of which it is a part, since even without such provision, all prior conflicting laws, or parts of laws, would be repealed by implication. See generally 82 C.J.S. Statutes §285, p. 476.

The controlling principle is well stated at 50 Am.Jur. Statutes §250, p. 529:

> "***Where an act, which is not a complete law within itself covering the whole subject, contains a provision to the effect that all laws and parts of laws inconsistent or in conflict therewith are repealed, the repeal extends to conflicting statutes and provisions only; all laws and parts of laws not in conflict therewith are left in full force and effect. A statute which is not wholly inconsistent with the new act continues in force except in so far as it conflicts therewith."

82 C.J.S. Statutes §291, p. 492, reads in pertinent part as follows:

> "Where there is sufficient repugnancy or inconsistency between two statutes, or parts of two statutes, to effect a repeal by implication, the earlier statute is impliedly repealed to, and only to, the extent of the conflict, repugnancy, or inconsistency."

Based on the foregoing, it is my opinion that the conflicting provisions of Section 818.01 were repealed by

the passage of Chapter 65-254, Laws of Florida 1965, more particularly, Section 679.311 thereof as same appears in the Florida Statutes, 1969.

Sincerely,

/s/ Robert L. Shevin

Robert L. Shevin
Attorney General

RLS/Am
Prepared by:
/s/ Wallace E. Allbritton

Wallace E. Allbritton
Assistant Attorney General

TABLE II-5.—*Comparison of expenses and profits as percent of sales for 10 low-income market retailers and 10 general market retailers of furniture and appliances in the District of Columbia, 1966*

Revenue component	10 low-income market retailers	10 general market retailers	Difference in margins and ratios	
			Percentage points	Percent of total
1966 net sales	$5,146,395	$5,405,221	.....	
	Percent	Percent		
Operating ratios as percent of sales ..	100.0	100.0	.....	
Cost of goods sold	37.8	64.5	.....	
Gross profit margin	62.2	35.5	+26.7	100.0
Salary and commission expense [1]	28.2	17.8	+10.4	38.9
Advertising expense	2.1	3.9	—1.8	—6.7
Bad-debt losses [2]	6.7	.3	+6.4	24.0
Other expenses [3]	21.3	11.2	+10.1	37.8
Total expenses	58.3	33.2	+25.1	94.0
Net profit return on sales	3.9	2.3	+1.6	6.0

[1] Includes officer's salaries.

[2] Includes amounts held back by finance companies to cover bad-debt losses.

[3] Other expenses, including taxes, after deduction of other income.

Source: FTC Survey

TABLE II-6.—*Net profit after taxes as a percent of sales and rates of return after taxes for District of Columbia retailers surveyed, 1966*

Type of retailers	Net profit after taxes as a percent of sales	Percent rate of return after taxes on stockholders' equity
Low-income market retailers	4.7	10.1
General market retailers:		
Appliance, radio, and television stores ..	2.1	20.3
Furniture and home-furnishing stores	3.9	17.6
Department stores	4.6	13.0

Source: FTC Survey

TABLE 7.4—*Reliance on Credit According to Income*

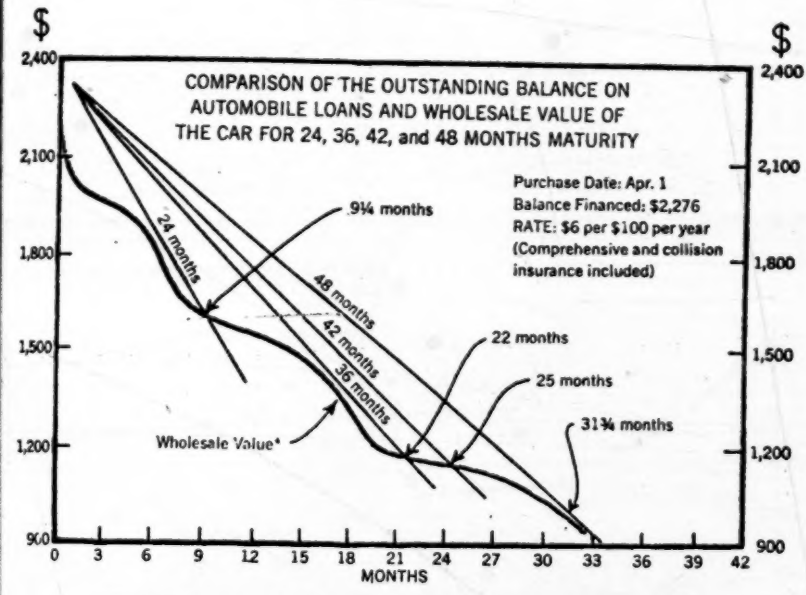
(In Per Cent)

Reliance on Credit	Income			
	Under $2,500	$2,500-$3,499	$3,500-$4,499	$4,500 and Over
Did not use credit	36	14	12	18
Used credit—no debts	21	21	20	17
Debts outstanding	43	65	68	65
Total per cent	100	100	100	100
Total cases	(101)	(151)	(124)	(88)

Source: Caplovitz, *The Poor Pay More.*

The Longer the Maturity on Auto Loans, the Longer the Wholesale Value of the Car Is Below the Outstanding Balance

This chart indicates the increased risk assumed by lenders on loans as the maturity of automobile loans is extended from 36 to 42 to 48 months. On a 24-month loan, the outstanding balance of a loan is greater than the wholesale value of the car for the first 9¼ months of the loan. It is during this period that the lender assumes the greatest risk since he is not likely to recover the outstanding balance if the car is repossessed and sold. With a 36-month loan, this period of risk exposure is extended to 22 months. On a 42-month loan the risk exposure period lasts for 25 months, whereas on a 48-month loan, the outstanding balance on the loan does not fall below the wholesale value for almost 32 months.



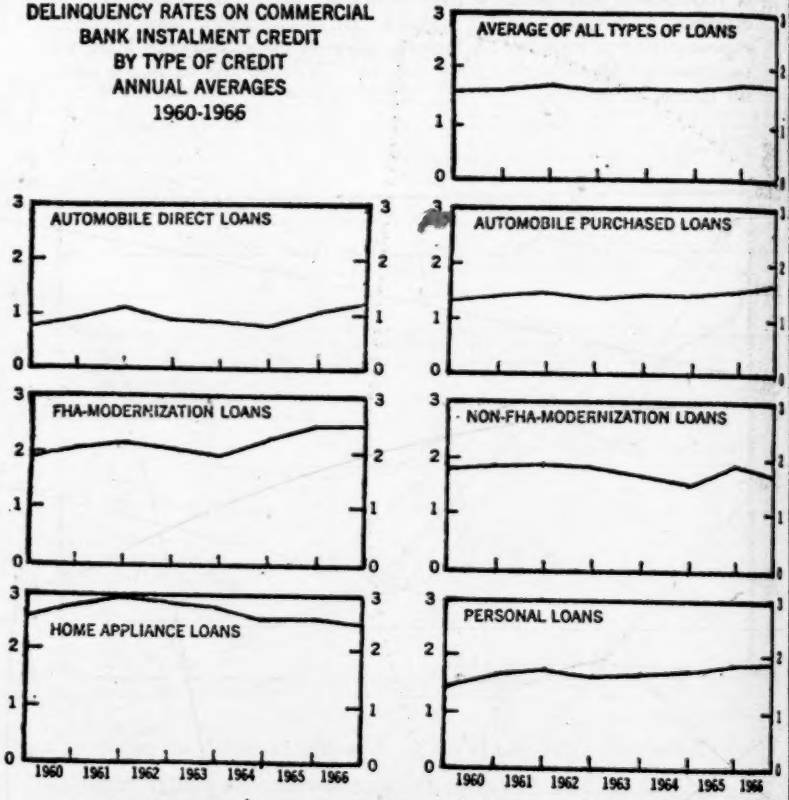
*Wholesale value line based on three-month moving averages.

SOURCE: The American Bankers Association, *Timely Notes on Instalment Credit*, July 1963, reprinted in Trends in Instalment Credit, prepared in 1967 for the Instalment Credit Committee by the Dept. of Economics & Research, The American Bankers Association.

Auto Loans Have the Lowest Delinquency Rates

The average delinquency rate in 1966 for all types of instalment credit was 1.76 per cent. Direct automobile loans had the lowest delinquency rate with 1.08 per cent, while purchased automobile loans had the next lowest with 1.60 per cent. Bank modernization loans came next with 1.72 per cent followed by personal loans with 1.85 per cent. The highest delinquency rates were recorded for FHA modernization loans—2.41 per cent—and for home appliance loans—2.45 per cent.

DELINQUENCY RATES ON COMMERCIAL BANK INSTALMENT CREDIT
BY TYPE OF CREDIT
ANNUAL AVERAGES
1960-1966

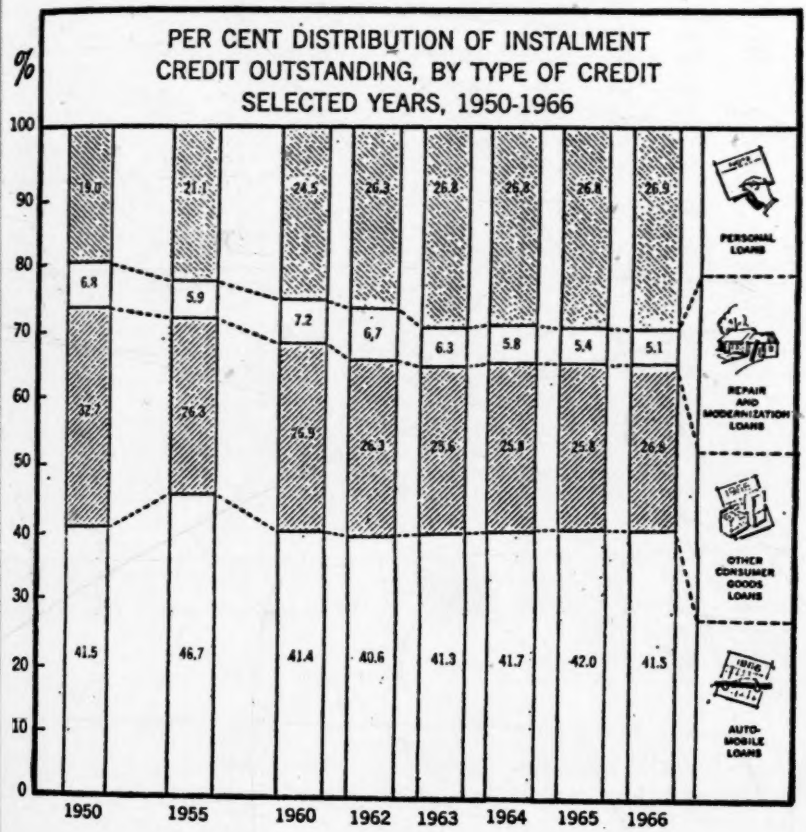


NOTE: Delinquency rates — annual average per cent of number of loans delinquent to total number of loans outstanding of each type of credit. The average of all types is weighted by the proportionate amount of each type of credit outstanding.

SOURCE: The American Bankers Association, *Delinquency Rates on Bank Instalment Loans*, reprinted in Trends in Instalment Credit, *supra*.

Auto Loans Represent 42 Per Cent of Total Instalment Credit

Automobile loans represented 41.5 per cent of total instalment credit at the end of 1966, remaining relatively stable during the sixties. The personal loans portion of the market also remained stable during the sixties, although compared to 1950 it went up from 19.0 per cent to 26.9 per cent of the total. Other consumer goods loans and repair and modernization loans have been experiencing decreases in their relative share of the instalment credit market; specifically the former dropped from 32.7 per cent in 1950 to 26.5 per cent in 1966, while the latter went from 6.8 per cent to 5.1 per cent.



FINANCE--CONSUMER CREDIT

CONSUMER CREDIT (SHORT- AND INTERMEDIATE-TERM)[1]

Year and month	Total ★	Installment credit, end of year or month: Total ★	Automobile paper[2] ★	Other consumer goods paper[2]	Repair and modernization loans[2]	Personal loans	By type of holder: Financial institutions: Total	Commercial banks	Sales finance companies	Credit unions	Consumer finance companies[4]	Other[4]
	Millions of dollars											
	7,222	4,503	1,497	1,620	298	1,088	3,065	1,079	1,197	132	....	[illegible]
	8,338	5,514	2,071	1,827	371	1,245	3,918	1,452	1,575	171	....	[illegible]
	9,172	6,085	2,458	1,929	376	1,322	4,480	1,726	1,797	198	....	[illegible]
	5,983	3,166	742	1,195	255	974	2,176	862	588	128	....	[illegible]
	4,901	2,136	355	819	130	832	1,413	532	232	103	....	[illegible]
	5,111	2,176	397	791	119	869	1,486	574	283	99	....	[illegible]
	5,665	2,462	455	816	182	1,009	1,776	745	300	102	....	[illegible]
	8,384	4,172	981	1,290	405	1,496	3,235	1,567	677	151	....	[illegible]
	11,598	6,695	1,924	2,143	718	1,910	5,255	2,625	1,335	235	....	[illegible]
	14,447	8,996	3,018	2,901	853	2,224	7,120	3,529	2,011	334	....	[illegible]
	17,364	11,590	4,555	2,706	898	2,431	9,257	4,439	2,944	438	....	[illegible]
	21,471	14,703	6,074	4,799	1,016	2,814	11,805	5,798	3,711	590	1,286	[illegible]
	22,712	15,294	5,972	4,880	1,085	3,357	12,124	5,771	3,654	635	1,555	[illegible]
	27,520	19,403	7,733	6,174	1,385	4,111	15,581	7,524	4,711	837	1,866	[illegible]
	31,393	23,005	9,835	6,779	1,610	4,781	18,963	8,998	5,927	1,124	2,137	[illegible]
	32,464	23,568	9,809	6,751	1,616	5,392	19,450	8,796	6,144	1,342	2,257	[illegible]
	38,830	28,906	13,460	7,641	1,693	6,112	24,398	10,601	8,447	1,678	2,623	[illegible]
	42,334	31,720	14,420	8,606	1,905	6,789	26,859	11,777	8,999	2,014	2,940	[illegible]
	44,971	33,868	15,340	8,844	2,101	7,582	28,915	12,843	9,324	2,429	3,124	[illegible]
	45,129	33,642	14,152	9,028	2,346	8,116	28,261	12,780	8,444	2,668	3,085	[illegible]
	51,544	39,247	16,420	10,631	2,809	9,386	33,131	15,227	9,880	3,280	3,337	[illegible]
	56,141	42,968	17,658	11,545	3,148	10,617	36,673	16,672	10,763	3,923	3,781	[illegible]
	57,982	43,891	17,135	11,862	3,221	11,673	37,471	17,008	10,327	4,303	4,165	[illegible]
	63,821	48,720	19,381	12,627	3,298	13,414	41,878	19,005	11,405	4,875	4,765	[illegible]
	71,739	55,486	22,254	14,177	3,437	15,618	47,879	22,023	12,630	5,526	5,582	[illegible]
	80,268	62,692	24,934	16,333	3,577	17,848	53,898	25,094	12,605	6,340	6,492	[illegible]
	90,314	71,324	28,619	18,565	3,728	20,412	61,533	28,962	15,279	7,324	7,329	[illegible]
	97,543	77,539	30,556	20,978	3,818	22,187	66,724	31,319	16,697	8,255	7,663	[illegible]
	102,132	80,926	30,724	22,395	3,789	24,018	69,490	32,700	16,838	8,972	8,103	[illegible]
	113,191	89,890	34,130	24,899	3,925	26,936	77,457	36,952	18,219	10,178	8,913	[illegible]
	79,764	62,609	24,957	16,209	3,550	17,893	53,988	25,191	13,588	6,293	6,519	[illegible]
	79,472	62,639	25,102	15,967	3,517	18,043	54,257	25,319	13,629	6,334	6,575	[illegible]
	79,703	63,022	25,407	15,867	3,512	18,236	54,780	25,610	13,666	6,438	6,641	[illegible]
	81,286	64,137	25,934	16,029	3,528	18,646	55,816	26,200	13,801	6,603	6,756	[illegible]
	82,551	65,095	26,405	16,206	3,567	18,917	56,712	26,670	13,961	6,727	6,838	[illegible]
	83,755	66,168	26,952	16,408	3,608	19,200	57,723	27,214	14,167	6,890	6,921	[illegible]
	84,587	67,057	27,487	16,538	3,644	19,388	58,580	27,674	14,424	6,969	6,983	[illegible]
	85,501	68,032	27,912	16,743	3,687	19,690	59,497	28,044	14,751	7,072	7,040	[illegible]
	86,068	68,577	27,975	17,042	3,708	19,852	59,924	28,246	14,893	7,135	7,058	[illegible]
	86,801	69,110	28,207	17,292	3,725	19,886	60,306	28,487	14,987	7,179	7,067	[illegible]
	87,749	69,812	28,405	17,613	3,737	20,057	60,778	28,685	15,081	7,249	7,134	[illegible]
	90,314	71,324	28,619	18,565	3,728	20,412	61,533	28,962	15,279	7,324	7,329	[illegible]
	89,642	71,067	28,556	18,438	3,689	20,384	61,442	28,951	15,281	7,343	7,318	[illegible]
	89,111	70,936	28,604	18,227	3,660	20,445	61,536	29,022	15,262	7,377	7,314	[illegible]
	89,542	71,351	28,913	18,205	3,653	20,580	62,009	29,348	15,297	7,387	7,316	[illegible]
	90,387	71,999	29,218	18,317	3,653	20,811	62,637	29,742	15,390	7,499	7,357	[illegible]
	91,414	72,667	29,529	18,437	3,696	21,005	63,279	30,072	15,501	7,617	7,388	[illegible]
	92,433	73,615	29,994	18,657	3,723	21,231	64,153	30,526	15,701	7,779	7,437	[illegible]
	92,995	74,386	30,240	18,918	3,772	21,376	64,789	30,855	15,895	7,846	7,843	[illegible]
	93,795	75,082	30,450	19,182	3,817	21,633	65,477	31,137	16,079	7,986	7,526	[illegible]
	93,973	75,306	30,289	19,452	3,835	21,730	65,397	31,125	16,151	8,059	7,514	[illegible]
	94,342	75,393	30,371	19,642	3,832	21,748	65,802	31,170	16,286	8,111	7,493	[illegible]
	95,098	76,144	30,499	19,951	3,838	21,856	66,133	31,211	16,461	8,190	7,501	[illegible]
	97,543	77,539	30,556	20,978	3,818	22,187	66,724	31,319	16,697	8,255	7,663	[illegible]
	96,407	76,855	30,304	20,744	3,772	22,035	66,287	31,146	16,612	8,183	7,599	[illegible]
	95,271	76,221	30,062	20,398	3,737	22,024	66,007	31,017	16,484	8,145	7,569	[illegible]
	95,231	76,183	30,056	20,274	3,722	22,131	66,053	31,062	16,422	8,216	7,558	[illegible]
	95,725	76,360	30,128	20,200	3,713	22,309	66,303	31,231	16,440	8,302	7,555	[illegible]
	96,427	76,784	30,321	20,238	3,752	22,473	66,706	31,427	16,471	8,414	7,561	[illegible]
	97,341	77,519	30,626	20,395	3,780	22,718	67,368	31,756	16,394	8,580	7,609	[illegible]
	97,632	77,860	30,792	20,442	3,789	22,837	67,768	32,008	16,681	8,627	7,645	[illegible]
	98,324	78,551	30,932	20,634	3,817	23,168	68,375	32,273	16,744	8,759	7,729	[illegible]
	98,625	78,765	30,741	20,878	3,814	23,332	68,474	32,386	16,666	8,806	7,787	[illegible]
	98,870	79,006	30,711	21,055	3,810	23,430	68,651	32,439	16,698	8,841	7,807	[illegible]
	99,668	79,485	30,718	21,323	3,810	23,634	68,945	32,567	16,723	8,908	7,888	[illegible]
	102,132	80,926	30,724	22,395	3,789	24,018	69,490	32,700	16,838	8,972	8,103	[illegible]
	101,260	80,379	30,579	22,117	3,734	23,949	69,238	32,730	16,726	8,868	8,058	[illegible]
	100,771	80,233	30,682	21,767	3,708	24,076	69,439	32,839	16,713	8,899	8,071	[illegible]
	100,981	80,474	30,942	21,644	3,688	24,200	69,840	33,082	16,759	8,975	8,091	[illegible]
	102,257	81,328	31,331	21,861	3,697	24,439	70,600	33,562	16,868	9,109	8,144	[illegible]
	103,415	82,312	31,818	22,011	3,746	24,737	71,360	34,079	17,010	9,271	8,175	[illegible]
	104,620	83,433	32,364	22,268	3,769	25,032	72,618	34,585	17,239	9,461	8,202	[illegible]
	105,680	84,448	32,876	22,452	3,808	25,314	73,573	35,103	17,448	9,574	8,397	[illegible]
	107,990	85,684	33,225	22,777	3,857	25,725	74,690	35,672	17,670	9,739	8,490	[illegible]
	107,636	86,164	33,336	22,968	3,881	25,979	75,116	35,923	17,680	9,851	8,530	[illegible]
	108,643	87,058	33,698	23,248	3,910	26,202	75,871	36,352	17,823	9,962	8,588	[illegible]
	110,025	87,953	33,925	23,668	3,931	26,429	76,666	36,560	17,960	10,069	8,683	[illegible]
	113,191	89,890	34,130	24,899	3,925	26,936	77,457	36,952	18,219	10,178	8,913	[illegible]

No. 497. Percent Distribution of Households Owning Cars and Appliances, By Income Level: 1960 and 1969

[Based on January 1960 and average of January and July 1969 sample surveys, except as noted. Ownership is not a direct measure of availability; many renter households live in units where major appliances are provided by the property owner]

Income level	Cars		Television		Washing machine	Clothes dryer	Refrigerator or freezer [1]	Dishwasher	Air conditioner [2]
	One or more	Two or more	Black and white	Color					
1960									
All households	75.0	16.4	86.7		74.5	17.4	86.1	4.9	12.8
Annual income: [3]									
Under $1,000	24.8	1.8	49.1		48.1	1.4	70.2	0.3	2.7
$1,000-$1,999	42.9	3.1	71.4		58.6	3.4	77.6	0.6	4.6
$2,000-$2,999	61.3	6.4	80.1		67.6	5.9	82.5	1.2	6.2
$3,000-$3,999	75.7	9.0	88.3		73.3	9.6	84.9	1.5	9.3
$4,000-$4,999	82.3	12.3	92.9		77.3	14.9	86.3	2.0	9.0
$5,000-$5,999	90.2	17.9	94.5		82.8	20.5	90.7	2.5	12.2
$6,000-$7,499	93.3	21.6	97.0		85.6	26.8	92.3	4.0	17.3
$7,500-$9,999	95.1	31.4	96.3		85.9	30.9	92.6	7.6	20.3
$10,000-$14,999	95.4	42.7	97.0		84.9	38.6	92.0	18.3	27.8
$15,000 and over	94.2	58.8	98.2		86.5	50.3	93.7	43.4	42.2
1969									
All households	79.6	29.0	79.0	31.9	70.0	35.0	82.6	13.7	[4] 20.5
Annual income: [3]									
Under $3,000	44.7	4.7	77.5	9.5	49.8	9.6	75.0	2.6	[4] 4.3
$3,000-$3,999	67.0	10.0	83.5	16.9	60.9	17.6	76.8	4.6	[4] 12.9
$4,000-$4,999	76.8	16.4	81.4	22.1	62.9	22.9	78.1	3.7	[4] 14.7
$5,000-$5,999	84.5	19.4	78.2	27.8	66.0	29.6	77.8	6.9	[4] 18.9
$6,000-$7,499	90.0	28.9	78.4	33.8	75.1	41.4	84.4	10.0	[4] 21.6
$7,500-$9,999	94.1	37.8	77.8	39.9	79.2	47.9	87.3	16.6	[4] 28.5
$10,000-$14,999	96.5	50.9	78.3	48.2	84.6	63.4	90.2	30.0	[4] 33.7
$15,000-$24,999	96.5	62.3	81.2	55.0	85.5	71.7	90.0	52.1	[4] 44.9
$25,000 and over	96.7	66.7	83.3	67.2	90.4	80.1	91.8	72.7	

[1] For 1960, refrigerators only. [2] Includes both room and central systems.
[3] Total money income (before taxes) of primary family or primary individual in 12 months immediately preceding interview. [4] 1967 data. Based on January 1967 sample survey.

Source: Dept. of Commerce, Bureau of the Census; *Current Population Reports*, Series P-65, Nos. 18 and 28.

No. 672. Consumer Credit: 1950 to 1970

[In millions of dollars. Prior to 1960, excludes Alaska and Hawaii. Estimated amounts of credit outstanding as of end of year or month; extended and repaid, for entire year or month. See also *Historical Statistics, Colonial Times to 1957*, series X 415-422]

TYPE OF CREDIT	1950	1955	1960	1965	1966	1967	1968	1969	1970, Mar.
Credit outstanding	21,471	38,830	56,141	90,314	97,543	102,132	113,191	122,469	119,698
Installment	14,703	28,906	42,968	71,324	77,539	80,926	89,590	98,169	96,662
Automobile paper	6,074	13,460	17,658	28,619	30,556	30,724	34,139	36,602	36,088
Other consumer goods paper	4,799	7,641	11,545	18,565	20,978	22,395	24,899	27,609	26,814
Repair and modernization loans [1]	1,016	1,693	3,148	3,728	3,818	3,789	3,925	4,040	3,951
Personal loans	2,814	6,112	10,617	20,412	22,187	24,018	26,936	29,918	29,809
Noninstallment	6,768	9,924	13,173	18,990	20,004	21,206	23,301	24,300	23,036
Single-payment loans	1,821	3,002	4,557	7,671	7,972	8,428	9,138	9,096	9,054
Charge accounts	3,367	4,795	5,229	6,430	6,686	6,968	7,755	8,234	6,645
Service credit	1,580	2,127	3,387	4,889	5,346	5,810	6,408	6,970	7,337
Installment credit:									
Extended	21,858	38,972	49,793	78,586	82,335	84,693	97,053	102,888	8,243
Repaid	18,445	33,634	46,073	69,957	76,120	81,306	88,089	94,609	8,473
Net change	3,113	5,338	3,720	8,629	6,215	3,387	8,964	8,279	−230
Policy loans by life insurance companies [2]	2,413	3,290	5,231	7,678	9,117	10,059	11,306	13,825	14,535

[1] Holdings of financial institutions; holdings of retail outlets are included in "Other consumer goods paper."
[2] Source: Institute of Life Insurance, New York, N.Y. Year end figures are annual statement asset values; month end figures are book value of ledger assets. These loans are excluded in consumer credit series.

Source: Board of Governors of the Federal Reserve System; *Federal Reserve Bulletin*, except as noted.

TABLE 34

Cumulative Percentage of Repossessions on New and Used Cars Financed by Number of Instalments Paid, 1933-62

Number of Instalments Paid	Year of Repossession										
	1933-37	1953	1954	1955	1956	1957	1958	1959	1960	1961	1962
New car repossessions											
0	13.5	14.2	12.4	15.6	12.3	11.2	8.0	10.4	8.6	6.1	7.8
1	25.6	25.2	22.5	27.9	22.2	20.2	14.6	18.1	15.5	11.2	14.0
2	38.3	35.7	32.1	38.9	32.1	29.1	22.0	25.4	22.8	16.6	20.0
3	50.2	45.6	40.8	48.9	41.3	36.7	29.4	32.0	29.9	22.2	25.9
4	60.9	55.3	49.2	57.5	50.1	43.8	36.6	38.0	36.7	27.6	31.4
5	70.1	63.6	56.8	65.0	58.0	50.1	43.6	43.3	43.0	33.2	36.5
6	77.5	70.6	63.3	71.0	65.1	55.8	50.1	48.2	49.0	38.7	40.9
7	83.3	76.7	68.9	75.7	71.1	61.0	56.2	52.6	54.5	43.9	45.1
8	87.7	82.3	74.1	80.0	76.4	65.9	61.7	56.5	59.5	49.0	48.9
9	91.3	87.0	78.6	83.8	80.9	70.3	66.5	60.3	64.2	53.8	52.7
10	100.0*	91.0	82.6	86.9	85.0	74.6	71.0	63.9	68.6	58.4	56.5
11		94.2	86.6	89.5	88.4	78.6	75.2	67.8	72.9	62.9	60.1
12 and over		100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0

Number of Instalments Paid	Year of Repossession										
	1933-37	1953	1954	1955	1956	1957	1958	1959	1960	1961	1962
Used car repossessions											
0	23.0	20.4	16.8	20.8	18.7	18.8	17.2	18.7	16.1	13.0	15.4
1	41.6	37.1	30.8	36.8	33.4	33.3	30.2	32.7	28.7	23.0	27.3
2	58.0	51.5	43.4	50.3	46.3	46.0	42.0	44.8	40.3	32.5	37.9
3	71.3	63.4	54.1	61.5	57.1	56.3	51.9	54.8	50.2	41.1	47.2
4	81.0	72.8	63.3	70.3	66.1	64.8	60.8	63.0	58.9	49.0	55.1
5	88.0	80.3	70.9	77.3	73.4	71.8	68.2	69.8	66.1	56.1	61.7
6	92.7	86.1	77.4	82.9	79.6	77.7	74.6	75.2	72.3	62.5	67.4
7	95.7	90.4	82.7	87.0	84.5	82.2	79.8	79.8	77.6	68.2	72.0
8	97.6	93.4	87.0	90.2	88.3	86.0	84.0	83.6	82.0	73.1	75.9
9	98.7	95.7	90.5	92.6	91.4	88.9	87.3	86.6	85.5	77.5	79.4
10	100.0*	97.3	93.2	94.4	93.7	91.3	90.0	89.2	88.5	81.3	82.4
11		98.3	95.2	95.8	95.3	93.2	92.3	91.2	90.9	84.5	85.0
12 and over		100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0

*Ten months and over.

Source: Figures for 1933-37 are from W. C. Plummer and R. Young, *Sales Finance Companies and Their Credit Practices* (New York: Nat. Bur. of Econ. Research, 1940), Table 34, p. 161. A large sales finance company supplied the data for 1953-62.

LOSS EXPERIENCE

TABLE 35

New and Used Car Repossessions in Relation to Contracts Written, 1953-61

Date of Contract	Repossessions during First Year of Contract in Relation to Accounts Written (Percentage)	Repossessions during First Year of Contract in Relation to Total Repossessions	Estimate of Total Repossessions in Relation to Accounts Purchased (Percentage)
New cars			
1953	1.6*	86.6	1.8
1954	1.9	89.5	2.1
1955	2.8	88.4	3.2
1956	4.0	78.6	5.1
1957	5.8	75.2	7.7
1958	4.5	67.8	6.6
1959	4.6	72.9	6.3
1960	4.6	62.9	7.3
1961	3.6†	60.1	6.0
Used cars			
1953	12.1*	95.2	12.7
1954	10.1	95.8	10.5
1955	10.9	95.3	11.4
1956	11.5	93.2	12.3
1957	12.9	92.3	14.0
1958	11.2	91.2	12.3
1959	11.8	90.9	13.0
1960	13.4	84.5	15.9
1961	10.5†	85.0	12.4

*Based on 8 months of 1953.
†Based on 11 months of 1961.
Source: A large sales finance company.

TABLE F-5

Estimated Repossession Rates, New-Automobile Contracts (Estimated by a Two-Year Weighted Moving Average to Approximate Rates for Loans as of Year of Purchase), Twelve Metropolitan Areas, 1953-55

	Area												
	A	B	C	D	E	F	G	H	I	J	K	L	Average of 12 Areas
1953													
Jan.	1.3	1.0	1.6	1.6	0.8	0.8	0.8	1.5	2.1	0.9	0.7	0.8	1.2
Apr.	1.1	0.8	1.8	1.5	0.6	0.5	0.7	1.3	1.1	0.8	0.6	0.8	1.0
July	1.3	0.9	2.1	1.7	0.9	0.5	0.8	1.4	1.3	0.9	0.8	1.1	1.1
Oct.	1.7	1.1	2.5	2.4	1.9	0.6	1.1	2.2	1.8	1.3	1.3	1.2	1.6
1954													
Jan.	2.9	1.8	4.3	3.9	3.6	1.4	2.7	4.3	3.5	2.4	2.9	2.2	3.0
Apr.	2.3	1.1	3.0	2.2	1.5	0.7	1.7	3.0	1.8	1.7	1.9	1.5	1.9
July	2.3	0.9	2.7	1.8	1.9	0.8	1.2	3.3	1.9	1.9	1.6	1.4	1.8
Oct.	3.3	1.3	3.5	2.4	1.8	1.2	1.8	4.0	2.2	2.2	1.9	1.8	2.3
1955													
Jan.	3.8	1.8	5.1	3.4	2.0	2.1	2.2	4.9	2.9	2.9	2.4	2.5	3.0
Apr.	2.6	1.1	4.2	2.4	1.6	1.3	1.2	3.9	2.1	2.3	1.3	1.5	2.1
Annual averages													
1953	1.4	1.0	2.0	1.8	1.0	0.6	0.8	1.6	1.6	1.0	0.9	1.0	1.2
1954	2.7	1.3	3.4	2.6	2.2	1.0	1.8	3.6	2.4	2.0	2.1	1.7	2.2
1955 (Jan. & Apr.)	3.2	1.4	4.6	2.9	1.8	1.7	1.7	4.4	2.5	2.6	1.8	2.0	2.5

Notes To Table F-5

Note: Inasmuch as the estimated repossession rates presented in this table have been utilized extensively in the text, it is appropriate to describe the method used for estimating repossession rates and the reasons why such estimation was necessary.

Repossession, if it is to occur, does so over a period of time after the purchase of an automobile; the down payment and maturity information presented as of the end of a year cannot properly be related to the actual repossession data for the same calendar year. Nor could any simple lagged relation significantly improve the correspondence.

The National Bureau obtained information from a large sales finance company indicating nationally the number of instalments paid before repossession occurred. About 89 per cent of all repossessions occur within the first year. By assuming arbitrarily that the rest occurred within the second year very little distortion was introduced by extrapolating the known time distribution for the first year and it was possible to obtain the following percentage distribution of the proportion of repossessions which would have occurred every three months for two years following the purchase of a car:

Number of Instalments Paid Prior to Repossession	Percentage of All Repossessions Occurring from Date of Loan Purchase
0–2 (1st Q)	34.3
3–5 (2nd Q)	26.0
6–8 (3rd Q)	17.6
9–11 (4th Q)	11.3
12–14 (5th Q)	6.8
15–17 (6th Q)	3.0
18–20 (7th Q)	.5
21 and over (8th Q)	.5
	100.0

These percentages were utilized as a moving sum in order to relate the number of repossessions to the time the loans were purchased. This method of weighting the repossession data was tested with aggregate data and found to be superior to any simple lagged method of estimating repossession rates as of the time the loan was purchased both for new-and used-automobile loans. Hence it was applied to the local area data to estimate repossession rates as of the time loans were purchased.

Because of the utilization of the moving sum method, the last three months (October, January, April) are subject to increasing error in the estimate due to the fact that the two year (8 point) moving sum is based on seven, six, and five observations respectively (adjusted to 8-point coverage). This means that a small fraction of loans is lost in the estimates, which understate the repossession rate estimate.